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No. 135

In the Supreme Court of the United States

OCTOBER TERM 1951

FEDERAL MARITIME BOARD, APPELLANT

v.

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT FEDERAL MARITIME BOARD

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18	817
22	821
31	830

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OPINION BELOW

The opinion of the three-Judge District Court (R., 118–135) is reported at 96 F. Supp. 883. An earlier opinion in the same case (allowing a preliminary injunction) is reported at 81 F. Supp. 544, app. dis. 336 U. S. 941.

JURISDICTION

The final order of the three-Judge District Court was entered March 21, 1951 (R. 148). The order allowing appeal was signed by Samuel H. Kaufman, D. J., on May 17, 1951, and was filed on that date. The jurisdiction of this court rests on 28 U. S. C. 1253 and 2101 (b).

QUESTIONS PRESENTED

1. Was the District Court justified in setting aside an order of the Maritime Board approving the conference dual rate system by which those shippers who contracted to ship exclusively by conference lines were given one schedule of "contract" rates and those who did not so contract were given a schedule of "noncontract" rates approximately 20% higher?

The Board's order was based on the finding that "the use of the dual rate system * * * is not unjustly discriminatory or unfair as between carriers [or] shippers * * * and does not operate to the detriment of the commerce of the United States and is not in violation of the Shipping Act, 1916."

The District Court set aside the order on an issue not raised before the District Court by the parties. It held that the Board had by implication adopted a finding of its examiner because that finding was consistent with the Board's report. The examiner's finding was that the differential between the contract and non-contract rates was an "arbitrary" differential (R., 258). The court then held that the arbitrary differential was an unreasonable one and therefore unreasonably and unjustly discriminatory and that such a basic finding was inconsistent with the Board's ultimate finding and that consequently the Board's ultimate finding could not stand.

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2. May the Federal Maritime Board under Section 15 of the Shipping Act of 1916 (46 U. S. C. 814), authorize the members of a steamship conference to employ a contract and non-contract dual rate system, i. e., give one set of rates to those who contract to ship exclusively on vessels of conference members and another and higher schedule of rates to those who do not sign such exclusive contracts?

STATUTE INVOLVED

Shipping Act, 1916, section 14 Third (46 U. S. C. 812, Third) and section 15 (46 U. S. C. 814). These sections are set forth in appendix A.

STATEMENT

The Parties

Appellant Federal Maritime Board is the agency charged with administration of the Shipping Act, 1916 (46 U. S. C. 801 et seq.). It was established by Reorganization Plan 21 of 1950 (15 F. R. 3178) as successor to the United States Maritime Commission, which administered the Shipping Act by virtue of 46 U. S. C. 1114. Before the creation of the Commission, the Shipping Act had been administered first by the United States Shipping Board and thereafter by the Shipping Board Bureau of the Department of Commerce. See *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146. This being a suit to review orders of the Commission, the Commission intervened as a matter of statutory right under 28 U. S. C. 2323 (R., 41), and the Board was substituted for

the Commission after the latter was dissolved (R., 48). Intervention by the Commission was made necessary by the refusal of the Attorney General (purporting to speak for the United States) to defend the Commission's orders against Isbrandtsen's attack (R., 45, 97).

Appellee Isbrandtsen Co., Inc., plaintiff in the District Court, is a carrier by water in the foreign commerce of the United States in the trade between United States North Atlantic ports and ports in Europe (R., 1).

The Appellee steamship companies, other than Isbrandtsen, were defendants in the District Court and are appellants in No. 134.[1] They are common carriers by water in the North Atlantic trade; are competitors of Isbrandtsen; and are organized into two conferences: (1) North Atlantic Continental Freight Conference, serving the trade outbound from the United States to Europe (R., 2–4); and (2) Continental North Atlantic Westbound Freight Conference, serving the same trade to the United States from Europe (R., 2–4). Both conferences were defendants in the District Court, are appellees here, and are appellants in No. 134. Each conference was organized under Section 15 of the Shipping Act by an appropriate

[1] The appeals in No. 134 and No. 135 are taken from a single order of the three-judge District Court. In No. 134 the conferences and their member lines are appellants. No. 135 is a separate appeal by the Maritime Board. Although it supports the position of the appellants in No. 134, those appellants are necessarily named as appellees in No. 135.

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conference agreement, and each agreement was approved under that section by the United States Maritime Commission (R., 6, 7).

Appellee United States of America was a statutory defendant by virtue of 28 U. S. C. 2322, and 46 U. S. C. 830.

Appellee United States Department of Agriculture intervened in Isbrandtsen's support pursuant to 7 U. S. C. 1622 (j) (R., 68).

The Complaint

The complaint in the District Court, originally filed in November 1948, alleged:

(1) That agreements of the defendant steamship conferences purported to authorize the member lines of such conferences to establish and maintain a system of "contract rates" and higher "noncontract rates", the sole consideration for the enjoyment of the lower "contract rates" being the shipper's commitment to patronize defendant conferences' shipping lines exclusively in effecting the shipper's transportation requirements in the North Atlantic trade (R., 5).

(2) That the Commission's orders approving these conference agreements authorizing contract and noncontract rates were contrary to section 14 and 15 of the Shipping Act (R., 5).

(3) That on or about October 1, 1948, the defendant conferences and their members sent notices to shippers in the North Atlantic trade that effective November 1, 1948, the "exclusive patronage con-

tract system" would be instituted simultaneously in the eastbound and westbound trade, covering substantially all commodities moving in that trade (R., 5).

(4) That these notices indicated that the contract rates to be instituted under the exclusive patronage system would be generally the same freight rates currently in effect, but that after November 1, 1948, such rates would be available only to shippers who agreed to employ the defendant conferences' lines exclusively for all of their shipments, and that any shipper not signing an exclusive patronage contract would be compelled to pay a rate 20% higher than the existing rates; and that any shipper violating an exclusive patronage contract by patronizing Isbrandtsen or other non-conference line would become liable for twice the amount of freight that would have been payable to a conference line had the shipment in question been shipped by a conference line (R., 6).

(5) That the Commission's orders approving defendants' conference agreements, insofar as they purported to authorize the defendant lines to use the exclusive patronage contract system, exceeded the authority of the Commission under sections 14 and 15 of the Shipping Act, 1916; and if such orders were within the scope of section 15, that section is unconstitutional as an excessive delegation of legislative power to the Commission in violation of Article 1, Section 1, and Article 1, Section 8, paragraph 18 of the Constitution of the

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United States; and the Commission's orders of approval deprived Isbrandtsen of its property without due process of law, contrary to the Fifth Amendment;

(6) That the exclusive patronage system proposed for use by the defendant conferences would compel shippers in the North Atlantic trade to cease patronizing Isbrandtsen, to Isbrandtsen's irreparable injury (R., 7–8).

The complaint demanded a preliminary and permanent injunction prohibiting the proposed use of the exclusive patronage contract system, and setting aside the Commission's orders of approval of the conference agreements.

Preliminary Proceedings in the District Court

Isbrandtsen's motion for preliminary injunction was heard by a three-Judge District Court convened pursuant to 28 U. S. C. 2325. The Court granted the preliminary injunction (81 F. Supp. 544, app. dis. 336 U. S. 941) but conditioned it upon the filing by Isbrandtsen, within twenty days after entry of the order, and diligent prosecution thereafter of a complaint before the Commission challenging the validity of the conference agreements under attack.

Proceedings Before the Commission

Isbrandtsen thereupon filed its complaint with the Commission (R., 167) as directed by the Court and as authorized by Section 22 of the Shipping Act (46 U. S. C. 821)—the proceeding thus in-

stituted being docketed by the Commission as No. 684. That complaint challenged the Commission's orders approving the exclusive patronage contract system upon the same grounds as those set forth in the complaint in the District Court, and demanded that the Commission issue a cease and desist order against the conference lines (R., 171). Hearings were held before a Commission examiner (R., 184–1106), who filed a recommended decision (R., 202) and a supplement thereto (R., 230), both recommending that the Commission dismiss Isbrandtsen's complaint. Isbrandtsen filed exceptions to the examiner's recommendations. The Federal Maritime Board, as the Commission's successor, heard argument thereon and on December 1, 1950, the Board issued its final report (R., 51) holding that the exclusive patronage contract system as proposed by the conferences and their member lines, was not unlawful. Simultaneously, it issued an order dismissing Isbrandtsen's complaint (R., 67).

Subsequent Proceedings Before the District Court

Isbrandtsen thereupon amended its complaint in the District Court to challenge, in addition to the Commission orders attacked by the original complaint, the Commission's order of December 1, 1950, dismissing the complaint in Docket 684, and to demand, in substance, that the interlocutory injunction previously issued by the District Court be made permanent (R., 7, 9). Answers to the

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amended complaint were filed (R., 41, 45, 49)—including the Attorney General's answer confessing the Board's error (R., 45)—and the suit was again brought before the District Court upon the complaint, answers, and the record before the Commission (R., 68).

In its opinion dated February 20, 1951, the District Court held that Isbrandtsen was entitled to a permanent injunction as demanded in the amended complaint (96 F. Supp. 883). On March 21, 1951, the District Court entered a final order (R., 148) enjoining the use of the exclusive patronage system by the defendant carriers and conferences and setting aside the order of the Federal Maritime Board dated December 1, 1950 (but making no reference to the original orders of the Commission approving the conference agreements). It is this final order of March 21, 1951 from which this appeal is taken.

The District Court's Opinion

The District Court, in its opinion by Frank, Circuit Judge, declined (96 F. Supp. at 885) to pass upon Isbrandtsen's contention that the exclusive patronage contract system is invalid under Sections 14 Third and 15 of the Shipping Act. It held, however, that the system, as proposed by the conferences and as approved by the Board in Docket 684, was unlawful, for the reasons set forth in the following excerpts from its opinion:

> In effect, the Board's position is that such a provision may be authorized under

Sec. 814 unless the Board finds that it is "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports". But the Board has made a finding, and the evidence before the Examiner shows that the announced contract and noncontract rates of the conference carriers, acting pursuant to the dual-rate provisions of the conference agreements, were such that the spread between those rates was arbitrary. The conference carriers thus interpreted the dual-rate provisions of the conference agreements as authorizing such an arbitrary spread, and the Board held valid the dual-rate provisions thus interpreted.

The effect of the Board's order is to approve the dual-rate provisions which permit unreasonable spreads between the contract and noncontract rates. We hold such dual-rate provisions to be unlawfully discriminatory between shippers, and we therefore set aside the Board's order. (96 F. Supp. at 886)

* * * * *

* * * a witness called by the carriers testified on cross-examination, that "generally the noncontract rates were fixed at a differential of approximately 20% above the contract rates" and that: "*I don't think the making of rates by differential is a proper basis, for that is an arbitrary basis.*" No evidence was offered contradicting this statement of the arbitrary

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nature of the differential. (96 F. Supp. at 887)[2]

The trial examiner made an initial report to the effect that the dual-rate provisions were not illegal per se. After receiving this report, the Commission (later superseded by the Board) issued a supplemental order returning the case to the examiner with directions to make findings as to whether the exclusive-contract provisions of this case "(1) are unjustly discriminatory or unfair as between * * * shippers, or (2) operate to the detriment of the commerce of the United States, or (3) are in violation of the provisions of the Shipping Act. * * *." The order also directed the examiner to rule upon the proposed findings of fact submitted by the complainant.

The examiner in his second report, pursuant to this order, found, as proposed by complainant, that the noncontract rates "were fixed by means of an arbitrary differential at a level 20% to 30% higher than the currently existing scale." (As the testimony quoted in footnote 10 shows, the announced contract rates were fixed by adopting that scale.) The Board did not in precise terms adopt this finding. But, in oral argument before the court, counsel for the Board construed its decision as accepting the examiner's findings insofar as they were not inconsistent

[2] Emphasis added, here and elsewhere except as otherwise noted.

with its own report. There is nothing in the Board's report inconsistent with this finding of the examiner. Accordingly, we conclude that the Board made this finding its own. (96 F. Supp. at 887–888)

* * * * *

* * * Dual-rate provisions which authorize arbitrary differentials are obviously not reasonable. For arbitrary conduct means unreasoned or unreasonable conduct, i. e., without reference to an adequate determining principle or standard; and unreasonable discrimination is the equivalent of "unjust" discrimination. Consequently, here the rates proposed to be charged shippers who do not sign contracts are unreasonably, and therefore unjustly, discriminatory; and the dual-rate provisions which permit such rates are invalid. (96 F. Supp. at 889.)

ERRORS ASSIGNED

The errors to be urged are those set forth in the Maritime Board's assignment of errors dated May 16, 1951, other than those numbered 1, 4, and 7 (R., 156).

SUMMARY OF ARGUMENT

Point I

THE DISTRICT COURT ERRED IN SETTING ASIDE THE FINDING OF THE MARITIME BOARD THAT "THE USE OF THE DUAL-RATE SYSTEM BY THE TWO CONFERENCES AND THEIR MEMBERS IS NOT UNJUSTLY DISCRIMINATORY OR UNFAIR AS BETWEEN CARRIERS [OR] SHIPPERS * * * AND DOES NOT OPERATE

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TO THE DETRIMENT OF THE COMMERCE OF THE UNITED STATES AND IS NOT IN VIOLATION OF THE SHIPPING ACT, 1916"

(a) *The District Court gave to the word "arbitrary," as used by the Examiner, an erroneous meaning.*

The District Court held that the examiner found "that the non-contract rates were fixed by means of an arbitrary differential at a level 20% to 30% higher than the currently existing scale," and that while the Board did not in terms adopt this finding, it was (a) consistent with the Board's report, and therefore adopted by the Board, and (b) that this finding was inconsistent with the Board's ultimate finding. The District Court said:

> An arbitrary differential is obviously not reasonable, for arbitrary conduct means unreasoned or unreasonable conduct * * * and unreasonable discrimination is equivalent to unjust discrimination.

The District Court misconceived the meaning and legal effect of the word "arbitrary" as used by the examiner and as understood by the Board.

Many rates for transportation services are based upon differentials above or below other rates, and such differentials are in most cases arbitrary. The word "arbitrary," as a noun, is a word of art in the field of rate making. It is defined in Webster's International Dictionary, 2nd Edition, as "a fixed sum allowed a delivering carrier, in addition to his mileage charge, in making or dividing a through rate."

Rates designated as arbitraries have been recognized in decisions of this Court. *United States* v. *Illinois Central Railway Co.*, 263 U. S. 515, 523; *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 361. In each case the arbitrary consisted of a differential added to one rate to make another.

If the word "arbitrary" is given its meaning in the field of rate making the examiner's finding is consistent with the Board's report and with the Board's ultimate finding. The employment of a differential, which is necessarily arbitrary in some degree, is an inherent feature of the dual rate system and the lawfulness of the system must be determined on that basis.

(b) *The Maritime Board is a body of experts in the field of marine transportation and its findings in this case should not have been set aside by the District Court.*

The decision of the questions involved in this case is the primary responsibility of the Board. In *United States Navigation Co.* v. *Cunard S. S. Co., Ltd.*, 284 U. S. 474, this Court held that a suit under the anti-trust laws to enjoin the use of the dual rate system by ocean carriers could not be entertained by a District Court because the subject matter of the controversy was within the Board's exclusive primary jurisdiction under the Shipping Act, 1916 (46 U. S. C. 801 et seq.). That decision was based upon the theory that the case presented questions involving a consideration of economic relations, and of facts peculiar to ocean transportation "generally unfamiliar to a

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judicial tribunal but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shiping trade; and with which that body, consequently is better able to deal." (284 U. S. at p. 485.) See *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297.

The Board found that the dual rate system was economically justified and was free of unjust discrimination and unfairness. Its decision should be sustained because the question whether a rate is preferential or discriminatory is a question of fact for determination by the regulating agency. *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 352; *United States Navigation Co.* v. *Cunard S. S. Co.* supra; *Swayne & Hoyt Ltd.* v. *United States,* supra; *Standard Oil Co.* v. *United States,* 283 U. S. 235; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 665; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481; *Western Paper Makers Chemical Co.* v. *United States,* 271 U. S. 268.

(c) *An attack against the validity of a rate must be confined to the inherent character of the rate itself, rather than to the method by which the rate was made.*

See *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, 389; *Danville Chamber of Commerce* v. *B. & O. R. R. Co.,* 255 I. C. C. 108, 115.

(d) *The District Court decided this case on an issue not raised by the parties either before the*

Maritime Board or the District Court. Isbrandtsen's sole contention was that the dual-rate system was unlawful per se under the provisions of Sections 14 Third and 15 of the Shipping Act.

The District Court, in setting aside the Board's order on the ground that the spread between the rates was arbitrary and that the dual rate system based upon such spread was therefore unlawful, relied upon a proposition of law and fact not tendered by the pleadings and not submitted to the Board or the District Court for decision. The sole question presented by Isbrandtsen was whether the dual rate system was unlawful on its face under the Shipping Act (R., 192). In deciding the case upon a ground not submitted for its consideration, the District Court took the parties by surprise, deprived them of the right to be heard upon an issue which the court deemed vital, and thereby denied to the parties their day in court. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267; *Hormel* v. *Helvering,* 312 U. S. 552, 556; *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 154; *National Labor Relations Board* v. *Service Trade Local 145,* 191 F. 2d, 65, 68.

Point II

THE MARITIME BOARD IS AUTHORIZED BY THE SHIPPING ACT TO APPROVE THE EXCLUSIVE PATRONAGE SYSTEM

The conference system of ocean rate-making is a device for controlling the rates and practices of

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ocean carriers in foreign commerce by an indirect, rather than direct, exercise of Governmental regulatory power. It involves a measure of self-regulation by the shipping industry in foreign trade, under government supervision, as a substitute for the more direct forms of government control exercised with respect to *domestic* carriers. The difference between the methods applied to foreign commerce and domestic commerce is necessitated by the impracticability of comprehensive direct regulation by one government of a carrier which is accountable not only to that government but to one or more other governments at its foreign points of origin or destination.

Legislative authorization of the conference system is based upon recognition that in foreign commerce, as in domestic, unrestricted competition between carriers fails to satisfy the requirements of the shipping public.

The dual rate exclusive patronage system furnishes a means by which the conferences are enabled to fulfill the functions for which they were organized—namely, the protection of regular and efficient steamship services provided under conference organization and discipline, and the maintenance of stable rate structures in foreign trade. Without such protection against unrestricted competition as the system confers, conferences would be stultified in the fulfillment of

their statutory mission, owing to the ease with which irregular carriers can enter a trade at cut rates during brief seasons of prosperity and disappear when short-term opportunities have been exhausted. It is for the basic purpose of protecting the regularity of steamship service and stability of rate structures that exclusive patronage arrangements have been found justified for use in the maritime foreign commerce of the United States.

(a) *Section 15 of the Shipping Act, as interpreted by the Board, is constitutional.*

Authorization for the use of the steamship conference system, including the dual rate system, is found in Section 15 of the Shipping Act, 1916. That section requires that steamship agreements restricting competition and fixing rates be filed with the Board, which is directed to approve them except upon the making of specified adverse findings. Disapproval is provided for if the Board finds that the agreements are unjustly discriminatory between carriers, shippers, and various others, or between exporters from the United States and their foreign competitors, or that they operate to the detriment of the commerce of the United States or are in violation of the Shipping Act. Agreements approved under Section 15 are exempt from the antitrust laws. Agreements disapproved may not lawfully be carried out. (Compare Civil Aeronautics Act, sec. 412, 49 U. S. C. 492.)

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The Board's approval of the conference agreements here involved, authorizing the conferences to use the dual rate system, constituted action well within the scope of power constitutionally delegated by Congress to the Board under section 15. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *United States* v. *Rock Royal Cooperative,* 307 U. S. 533; *Tigner* v. *Texas,* 310 U. S. 141; *Liberty Warehouse Co.* v. *Burley Tobacco Cooperative,* 276 U. S. 71, 90.

The Board's approval of the conference agreements involved no transfer to the conferences of sovereign power to restrict or exclude competition, because the Board, under Section 15, retained a full measure of regulatory power over the conferences including supervision of their rates, by virtue of its statutory power to disapprove conference agreements at any time. *Edmond Weil* v. *Italian Line,* 1 U. S. M. C. 395; *In the Matter of Rates, Charges, Rules, etc., of the Common Carriers Parties to the Pacific Coast River Plate Brazil Conference Agreement,* 2 U. S. M. C. 28; *Pacific Forest Industries* v. *Blue Star Line,* 2 U. S. M. C. 54. See also *IATA Agency Resolutions Proceeding* (Civil Aeronautics Board, January 26, 1951 — C. A. B. —; *Hampton & Co.* v. *United States,* 276 U. S. 394, 407; *Currin* v. *Wallace,* 306 U. S. 1, 15.

(b) *Approval of the exclusive patronage system is within the Board's power under Section 15 of the Shipping Act.*

This is not a case instituted under the anti-trust laws, and in that respect is distinguished from *Far East Conference* v. *United States,* No. 15 on the current Miscellaneous Docket. Isbrandtsen seeks relief solely under the Shipping Act, which in Section 15 provides that *conference agreements approved by the Board shall be excepted from the anti-trust laws.* Such exceptions are to be interpreted with the same liberality as the anti-trust laws themselves. *United States* v. *Minnesota Mining & Manufacturing Co.,* 92 F. Supp. 947, 965.

The Board's authority to authorize the dual rate system depends upon sections 14 and 15 of the Shipping Act.

The affirmative grant of authority under Section 15 for the approval of conference agreements clearly embraces such agreements as provide for the dual rate system, since the section requires the filing of all agreements between common carriers, which fix rates, give special rates, or control, regulate, prevent, or destroy competition, or which provide for exclusive, preferential, or cooperative working arrangements. The Board is directed to approve all such agreements as are not found to be unjustly discriminatory or unfair, or detrimental to the commerce of the United States, or violative of the Shipping Act.

Since the dual rate system is one which gives special rates, controls competition, and provides for exclusive arrangements, conference agree-

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ments authorizing carriers to use the system are explicitly within the scope of Section 15.

Section 15 authorizes not only agreements which permit restraints of competition among conference members, but also restraints as between carriers in a conference and those outside. This construction of Section 15 is fully supported by the legislative history of that provision. Devices to control competition between a conference and outsiders are necessary measures without which the purpose of the conference system could not be fulfilled. See *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 392.

While contracts between carriers and shippers are not explicitly within the scope of Section 15, it is clear that the immunity from the anti-trust laws conferred by that section covers the execution and performance of such contracts between carriers and shippers as are necessary to permit the conference to carry out its authorized purposes. See *Central Transfer Co.* v. *Terminal R. R. Co.,* 288 U. S. 469, 476. Since the Board has authorized the conference to employ contract and non-contract rates, the contracts with shippers providing for such rates are unquestionably lawful if the conference agreement is lawful.

In enacting the Shipping Act, Congress was aware that the conference system largely results in placing rates outside the influence of competition. It knew that competition between conference lines and their non-conference competi-

tors had traditionally been curtailed by a particular form of the exclusive contract system known as the "deferred rebate." It specifically prohibited the deferred rebate (in paragraph Fourth of Section 14 of the Act) but it enacted no specific condemnation of the exclusive contract system in any other form.

Accordingly, having regard for the language and general purposes of Section 15, it must be concluded that the section was intended to authorize such competitive restraint as the dual rate system involves.

(c) *The exclusive patronage system is not prohibited by Section 14 Third of the Shipping Act.*

In *United States Navigation Co.* v. *Cunard Steamship Co., supra,* this Court refused to enjoin the use of the dual rate system under the Sherman Act, holding that the case must first be considered by the Shipping Board. The plaintiff claimed that reference to the Board would be futile because the Board could in no event approve a dual rate, exclusive patronage arrangement. This contention the Court specifically rejected (284 U. S. at 487).

Section 14 Third provides that no common carrier by water shall "retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to *other discriminating or unfair methods,* because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

The substance of Isbrandtsen's contention here is that the dual rate system involves a retaliation or discrimination against a shipper for patronizing a carrier other than a member of the conference. Its contention is unsound because (a) the system involves no retaliation, which connotes a motive of revenge on the part of a carrier for a shipper's conduct *in the past;* and (b) the system is not a discrimination based upon a shipper's patronage of another carrier—the non-contract rates being applied to *all* non-contract shippers *whether they have patronized another carrier or not.*

Further, the expression "other discriminating or unfair methods" in Section 14 Third must be interpreted as if it read "other *unduly* discriminating or unfair methods"—this interpretation being required by the legislative history of the section, and in the interest of harmony between Section 14 Third and other portions of the statute.

Section 14 Third appears to be a statutory codification of *Menacho* v. *Ward,* 27 Fed. 529, which enjoined a carrier from charging rates higher than its usual rates, as an act of retaliation for a shipper's past conduct; but the case conceded that a shipper's *agreement* to give a carrier his whole patronage would merit a rate concession (27 Fed. at p. 533). Dual rates have always been lawful where the higher of the two rate levels was not unreasonable. *Lough* v. *Outerbridge,* 143

N. Y. 271; *Mogul S. S. Co.* v. *McGregor* (1892) 17 App. Cas. 25.

In a case where the Shipping Board Bureau had outlawed the dual rate system in the intercoastal *domestic* trade for reasons peculiar to that trade, this court held that its decision was conclusive if supported by substantial evidence. *Swayne & Hoyt, Ltd.* v. *United States,* supra. The case stands equally for the proposition that where the evidence warrants approval rather than disapproval, an order approving the system is equally conclusive.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN SETTING ASIDE THE FINDING OF THE MARITIME BOARD THAT "THE USE OF THE DUAL RATE SYSTEM BY THE TWO CONFERENCES AND THEIR MEMBERS IS NOT UNJUSTLY DISCRIMINATORY OR UNFAIR AS BETWEEN CARRIERS [OR] SHIPPERS * * * AND DOES NOT OPERATE TO THE DETRIMENT OF THE COMMERCE OF THE UNITED STATES AND IS NOT IN VIOLATION OF THE SHIPPING ACT, 1916"

(a) *The District Court gave an erroneous meaning to the word "arbitrary" as used by the Examiner.*

The Board, the Examiner and the witness Andrews, whose testimony was the basis for the Examiner's finding, used the word "arbitrary" to mean merely a differential. Andrews testified: "*I do not think the making of rates by differen-*

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tial is a proper basis, for that is an arbitrary basis." (R., 861.)

There was a spread between the contract and non-contract rates. There can be no dual-rate system without a spread or a differential. The spread or differential is the same no matter by what name it is called, and its character is not changed by referring to it as "arbitrary." To Andrews, the Examiner and the Board, "arbitrary" merely meant a differential or a spread between non-contract rates and contract rates for the same services.

The District Court's decision is based solely upon its erroneous and unsubstantiated interpretation of the word "arbitrary." In referring to other decisions of the Board approving a dual-rate system that court said (R. 131):

> What is even more to the point, in each of the cases in which such intimations occurred, there was absent any specific findings, such as we have here, that the spread between the contract and noncontract rates was arbitrary. As previously noted, in *Rawleigh* v. *Stoomvart*, 1 U. S. S. B. 285, the Shipping Board said that a dual-rate provision in a conference agreement is invalid if the spread is unlawful. In no subsequent decision by the Board or by any of its predecessors has that ruling been rejected. In the Rawleigh case, however, the Shipping Board sustained such a provision without considering the spread. But it did

> so only because, as the Board's opinion discloses, there the complainant had explicitly stated: "The question of rates from our viewpoint . . ., or the spread between them, is entirely immaterial and outside the scope of this proceeding." For that reason, the Board held that that particular proceeding "does not present for determination anything other than the lawfulness in the trade concerned of the contract-noncontract rate practice itself, apart from and independent of any factor of quantum of spread," and "involves no issue respecting anything other than the lawfulness of the contract rate practice per se." But the instant case is in that respect clearly distinguishable: Here the complainant proved before the Board that the spread was not reasonable; the Board, by its supplemental order, directed the examiner to rule upon findings of fact proposed by the complainant; the examiner, in conformity with that direction, explicitly found that the differential between the rates was arbitrary; and the Board has adopted that finding.

One of the meanings of "arbitrary" as defined in Webster's International dictionary, 2nd edition is—

> depending on will or discretion; specif., determined or determinable by decision of a judge or tribunal rather than defined by statute; discretionary.

"Arbitrary" is then defined as a noun, which, in the field of transportation, means:

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> A fixed sum allowed a delivering carrier, in addition to his mileage charge, in making or dividing a through rate.

This court in *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 361, recognized this meaning of the word "arbitrary" in the transportation field, saying:

> Transportation conditions in Florida are less favorable than in the south generally, but a Florida *arbitrary* is added to the rate. It is deducted before proration and added to the southern division of the balance of the joint rate.

In *United States* v. *Illinois Central Railway Co.,* 263 U. S. 515, 523, this Court said:

> Where the through rate from points on the connection is higher than the junction-point rate, the connecting line receives as its share an additional amount consisting of the difference between these rates. This additional amount is called the *arbitrary, or differential.* Thus, the Fernwood & Gulf receives a division of 4 cents per 100 pounds, consisting of a 2-cent absorption and a 2-cent arbitrary.

That the rates were not arbitrary in the sense of "unjust" or "unreasonable" is indicated by the testimony of the witness Rosenthal, a substantial shipper in the North Atlantic trade. Mr. Rosenthal, when cross-examined as to whether he was "impervious to the level of rates being charged the shipping public," replied that he was not, and

that rates were regularly determined by a general satisfactory process of negotiation between conferences and shippers (R., 782–783).

The same witness strongly supported not only the conference system, but the exclusive patronage system as well, on the ground that they assisted in the maintenance of an even level of rates and the promotion of good shipping service[3] (R., 766–772). This testimony negates the inference drawn by the District Court from the Andrews testimony and the purported finding based thereon.

The District Court held that the Board adopted finding No. 14 of the Examiner (R. 258) because it adopted all his findings not inconsistent with the Board's report. The District Court construes finding No. 14 to be inconsistent with the Board's ultimate finding. These findings are perfectly consistent, however, if the word "arbitrary" is given its meaning in the transportation industry, that is, a differential; and that is the sense in which the witness Andrews used the term, and in which the Board understood it.

There was no proof that any of the rates were unreasonable and there is no finding that any of them were unreasonable. All the examiner found was that a differential was fixed between contract and non-contract rates without the use of a scientific measuring rod. That is what Andrews

[3] For a recent official corroboration of this view see the reference in footnote 7, *infra*, p. 44.

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meant in his testimony; that is what the Examiner meant and that is what the Board meant when it found that the dual-rate system was lawful and approved it.

That the term "arbitrary" implies no disparagement of the lawful character of a rate is manifest from the fact that many rates, based upon differentials above or below other rates, are regularly referred to in transportation parlance as "arbitraries." See *United States* v. *Illinois R. Co., supra; Baltimore & O. R. Co.* v. *United States, supra.* Nothing could more clearly designate that a rate was arbitrarily adopted than the fact that the carrier employing it calls it an arbitrary; but we are unaware that any such rate has been held subject to inherent infirmity simply because of the word used to describe it.

If a railroad rate constructed on a differential basis is not unlawful because of its name, neither are the contract and non-contract rates of the conference carriers unlawful simply because of a witness's statement that since the two types of rates were made on a differential basis, the spread between them was arbitrary.

Obviously, the spread between the contract and non-contract rates was arbitrary (in the sense that it involved a differential)—not because the conference chairman said so, but because of the inherent nature of the dual rate system. This Court in *United States Navigation Co.* v. *Cunard S. S. Co., supra,* explicitly characterized as "purely arbi-

trary" (284 U. S. at 479) a contract rate system based upon a spread involving non-contract rates as much as 100% over contract rates—but it refused to condemn the system and held that its propriety must be determined in the first instance by the Maritime Commission.

That the non-contract rates in the present case were generally in excess of the contract rates by a uniform margin (of about 20%) was from the outset a fundamental feature of the system, well understood by the Board, the conferences, and Isbrandtsen. No serious contention was made by any interested party that the higher scale was determined otherwise than by a percentage addition to the lower; and the conferences made no pretense of having fixed the non-contract rate on each commodity by any formal fact-finding procedure. Accordingly, the fundamental issue of the case was in no way affected by Chairman Andrews' testimony which the District Court viewed as the crux of the litigation. That testimony was completely without significance, and the issues presented for decision were not in the slightest degree different after that testimony had become a part of the record than they were before.

The question at the outset was whether the Board may empower a conference to employ a dual rate scale in aid of an undertaking to secure the exclusive patronage of shippers. That was still the issue when Mr. Andrews testified and remains the issue today. It could not be success-

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fully argued that a decision in favor of the conferences could have been supported solely by opinion testimony of a conference chairman that the rate spread was "reasonable"; and by the same token, it cannot be held that the conference case collapses because the same witness said that the spread was "arbitrary."[4] To decide the case on the basis of a witness's adjective is to dispose of the controversy on an "oversimplified form of proof" that debases the statutory concept of a "full hearing" (46 U. S. C. 821) and transforms the requirement of such hearing into "mere surplusage." *North Carolina* v. *United States,* 325 U. S. 507, 512.

(b) *The Maritime Board is a body of experts in the field of transportation and their findings in this case should not have been set aside by the District Court.*

The Maritime Board was dealing with matters with which it was thoroughly familiar and the District Court should not have substituted its interpretation of the facts for those of the Board and set aside the Board's findings of fact and decision. In *United States Navigation Co.* v.

[4] The spread must be justified on the basis that it is large enough to induce shippers to sign exclusive contracts and to assist the carrier to render a more efficient service, since the dual-rate system has no other purpose. (R., 1017.) A spread so small as to furnish insufficient inducement to that end would obviously be an unjust discrimination because unrelated to any lawful rate-making consideration. The non-contract rate must, of course, be a reasonable rate. *Lough* v. *Outerbridge*, 143 N. Y. 271.

Cunard S. S. Co., supra, this Court said (284 U. S. at p. 485):

> The [shipping] act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.[5]

In footnote 16 of its opinion, the District Court said (R., 127):

> In this connection, however, there may be noted *Lough* v. *Outerbridge,* 143 N. Y. 271, on which the Board relied in interpreting the statute. There, in 1894, before

[5] The decision involved an attack under the Sherman Act, on the exclusive patronage-contract system. This Court dismissed the complaint on the ground that the case was within the exclusive preliminary jurisdiction of the Shipping Board.

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> the statute, the court held that, in special circumstances, it was lawful for a water-carrier to grant lower rates to shippers making exclusive-patronage contracts. But the court based its decision on the fact that there was an express finding by the trial court that the non-contract rates were reasonable, so that there was "no refusal to carry for a reasonable compensation," and no "detriment to the public by exacting unreasonable charges." The court said: "If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons, not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. . . . Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise."[6]

Such an inquiry was conducted by the Board and it found nothing unreasonable or unlawful in the rate schedules; in fact, the reasonableness of the rates was not attacked by Isbrandtsen or any

[6] The fact that a particular rate is reasonable does not indicate that a higher or a lower rate is unreasonable. "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. and P. R. Co.*, 294 U. S. 499, 506; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 460–461; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251.

parties to the proceeding before the Board. The Board said in its report (R., 53):

> When the case came on before the examiner, Isbrandtsen filed copies of the proceedings in the District Court, the conference agreements, the contracts and rates, and thereupon rested, arguing that the dual-rate system on its face showed a *prima facie* case of discrimination which was illegal *per se*. The record before us giving the history and actual operation of the system was developed from witnesses produced by respondents.

The difference between the contract and non-contract rates in *Lough* v. *Outerbridge*, 143 N. Y. 271, was just as as arbitrary as that involved here. There were two rates for the same service and yet the court did not hold that the higher rate was unreasonable or unjust or discriminatory. In *United States Navigation, supra,* this Court had before it a situation where different rates were charged for identical services, one on a contract basis and another on a non-contract basis, and yet this court did not hold them invalid but directed the plaintiff to seek relief first from the Shipping Board. The Court said (284 U. S. at 479):

> The conspiracy involves the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents. The differentials thus created between the two

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> rates are not predicated upon volume of traffic or frequency or regularity of shipment, but are purely arbitrary and wholly disproportionate to any difference in service rendered, the sole consideration being their effect as a coercive measure. The tariff rate in numerous instances is as much as one hundred percent higher than the contract rate. The disproportionately wide spread of these differentials is wholly arbitrary and unreasonable. The respondents have put into effect what is called a scheme of joint exclusive patronage contracts, by which shippers are required to agree to ship exclusively by their lines, and to refrain from offering any shipments to petitioner. Unless they so agree, the shippers are forced to pay the far higher general tariff rates. The plan is resorted to for the purpose of coercing shippers to deal exclusively with respondents and refrain from shipping by the vessels of petitioner, and thus exclude it entirely from the carrying trade between the United States and Great Britain.

Even with these allegations the Court said the issue was a matter for consideration first by the Shipping Board, the predecessor of the present Maritime Board.

The lawfulness of the dual-rate system has been approved by the Maritime Board, a tribunal of experts, and that approval should be allowed to stand. As was recently stated in *American Airlines* v. *Civil Aeronautics Board* (C. A. D. C. Sept. 27, 1950), 20 L. W. 2117, — F. 2d —:

> * * * The function of the agencies to which Congress has delegated these responsibilities is to examine the relevant past and present and then to exercise a rational judgment upon that data to ascertain the public convenience and necessity in the reasonably foreseeable future.

Applying this standard, the Maritime Board concluded in its opinion (R., 63–64):

> If the conference members are to provide the service which the shippers value, the service must be matched by a regular availability of cargo from those shippers. The conferences realize that to sustain these mutual benefits, something more than voluntary shipper cooperation must be agreed to. The dual-rate system is the device which has been developed for that purpose. Shippers have testified in this case that they deem the stability of rates and regularity of service which a conference can offer are worth the price measured in terms of freight rates. By obtaining exclusive contracts from shippers the carriers are better able to estimate the approximate volume of traffic that is to be expected, tonnage their routes, and arrange their sailings accordingly. As previously indicated, the contracts under consideration guarantee to the shipper that his rate will not be changed for approximately 80 days, and the evidence shows that longer commitments are sometimes granted. In any event, small shippers are put on the same plane with

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> large shippers and both are thus encouraged to engage in "forward trading", so necessary for foreign commerce.

Whether a rate of a common carrier is arbitrary or preferential or discriminatory is a question peculiarly within the province of the regulating agency—even where the evidence is undisputed. As stated in *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352:

> The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when "undue," "unjust," "unfair," and "unreasonable." And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages, and discrimination.

The same principles apply to the Federal Maritime Board. *United States Navigation Co.* v. *Cunard S. S. Co., supra*, 284 U. S. at 480. Accordingly, the Board was not only entitled, but required, to determine the issue of unjust discrimination under the Shipping Act, *as a question of fact*. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304; *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665; *Manufacturers Ry. Co.*

v. *United States,* 246 U. S. 457, 481. And in making this determination the Board's decision is conclusive unless plainly contrary to law. See *Western Paper Makers Chemical Co.* v. *United States* 271 U. S. 268; and *United States Navigation Co.* v. *Cunard S. S. Co., supra,* where this Court said of the Maritime Commission's authority to pass upon the lawfulness of the exclusive patronage system (284 U. S. at 485):

> * * * Preliminary resort to the commission is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts * * *

(c) *Any inquiry as to the propriety of a rate must be addressed to the rate itself and not to the process by which the rate was determined.*

A common carrier is not now and never has been obliged to construct its tariffs on the basis of evidence and findings supported by evidence. Under the Interstate Commerce Act, the Shipping Act, and other regulatory measures, the carrier or other public utility is entitled to make and file such rates as it deems proper and those rates are

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supported by a presumption of lawfulness. See *Arizona Grocery Co.* v. *Atchison T. & S. F. R. Co.*, 284 U. S. 370; *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U. S. 499; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 522.

"A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise." *United States* v. *Illinois Central R. Co., supra.* In the case of a rate attacked for unlawful discrimination, "What is unlawful in the action of the carriers inheres in its discriminatory quality, and not in anything else." *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, 389. "The method used to make rates is of no importance if it is practicable and the resulting rates are lawful." *Danville Chamber of Commerce* v. *B. & O. R. R. Co.*, 255 I. C. C. 108, 115.

(d) *The District Court decided this case on an issue not raised by the parties either before the Maritime Board or the District Court. Isbrandtsen's sole contention was that the dual-rate system was unlawful per se under the provisions of Sections 14 Third and 15 of the Shipping Act.*

In deciding this case upon grounds not submitted for its consideration, the District Court confronted the parties with a determination that took them by surprise and that ignored the rights of the Board, the conferences, and the defendant carriers, as fully as if they had been wholly deprived of a hearing. See *City of Abilene* v. *Cor-*

nell University (8th Cir.), 118 Fed. 379, 381; *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267.

In *Hormel* v. *Helvering,* 312 U. S. 552, 556, this court said:

> Ordinarily an appellate court does not give consideration to issues not raised below * * * Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the Board of Tax Appeals * * *

This Court again condemned the practice of injecting new issues into litigated cases for the first time in the reviewing court, in *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 154, in which the germane portion of the opinion stated:

> So far as we are able to determine, this issue was injected for the first time by the opinion of the majority of the Court of Appeals. The contention does not seem to have been raised or pressed by respondents up to that point. The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the

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> matter, make its ruling, and state the reasons for its action.

Judge Frank recently applied this rule in *National Labor Relations Board* v. *Service Trade Local 145* (2d Cir., 1951), 191 F. 2d 65, 68, where he said for a unanimous court:

> As those criteria had not yet been formulated when the Board decided the instant case, the Board did not here apply them or make findings pertinent thereto, and accordingly we are now in no position adequately to review its decision. We therefore remand the case to the Board. * * *

For the purpose of the preceding arguments, we have accepted the District Court's assumption that the Board adopted its examiner's finding No. 14 (R., 124) to the effect that the spread between the contract and non-contract rates was "arbitrary." The Court, however, conceded that the Board did not expressly adopt this finding, and the effect of an "arbitrary" spread was nowhere considered in the Board's opinion. Accordingly, the Court did not have the benefit of the Board's views with respect to the meaning of a technical term which the Court deemed vital to its decision. In these circumstances, it is clear from the foregoing authorities that (1) if the court felt the case should have been decided upon a ground not submitted to or argued before it, it should have remanded the case to the Board for consideration of the neglected point; and (2) its decision is reversible for its failure so to do.

Point II

THE MARITIME BOARD IS AUTHORIZED BY THE SHIPPING ACT TO APPROVE THE EXCLUSIVE PATRONAGE SYSTEM

The dual-rate exclusive patronage system, or some genera'ly equivalent device, is a necessary feature in any program for the regulation of foreign shipping which looks towards the maintenance of good service to the shipping public. The system fills an inherent need arising from the impotence of any one sovereign to control by direct mandate the conduct of an industry whose operations are necessarily international in that every voyage is the direct concern not of one government but of two or more. While it is *possible* for one government to prescribe the details of a carrier's conduct, it is generally impracticable to do so because another government may subject the carrier to conflicting rules, with the result that both sets of rules cannot be obeyed.

Congress has not sought, by the Shipping Act or any other statute, to subject ocean carriers in foreign commerce to the same pattern of detailed direct regulation generally applied to domestic transportation. It has established, through the legalization of conferences, a system of limited and officially supervised self-regulation by the shipping industry to accomplish by indirection what cannot practicably be achieved by direct means.

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The Shipping Act marks out a pattern for the limitation and control of unrestricted maritime competition in foreign commerce. It does this by authorizing competitive restraints under government control, rather than by direct legislative or administratve mandate. This regulatory scheme is one born of necessity.

Control of unlimited competition is an objective of every major statute regulating *domestic* transportation. Such statutes generally provide for certificates of public convenience and necessity, and confer upon the regulating body a power to prescribe rates—maximum, minimum, or actual. Excessive service on a route is prevented by the denial of a certificate, and resort to destructively cheap rate levels is prevented by minimum rate orders.

These devices are not available for the control of foreign commerce, but the competitive problems characteristic of domestic transportation are nevertheless present, frequently in accentuated degree, and must be met by alternative methods. The exclusive patronage system is one such alternative. It has the dual effect of preventing an uncontrolled excess of tonnage on particular trade routes, and of maintaining even and compensatory levels of ocean freight rates. Without some such system, the sea lanes are open without restriction to all who wish to use them, and ship operators are free to appear in good times and disappear in bad, without account-

ability for the maintenance of adequate service or for the protection of stable rate structures.[7] It was in recognition of these conditions that the Congress provided in Section 15 of the Shipping Act, 1916, for control over conferences and conference agreements by a board of experts competent to deal with special problems of the industry.

Acting on the authorization of Section 15 of the Shipping Act, 1916, the Board has approved no fewer than 32 conference agreements which provide either specifically or inferentially for dual rates, and of these, 24 are now in effect and the respective conferences are using the system (R., 59).

(a) *Section 15 of the Shipping Act, as interpreted by the Board, is constitutional.*

The complaint before the Board and the amended complaint before the District Court (R., 7, 170–171) allege that (1) if Section 15 may be construed as authorizing or empowering the Board to issue orders approving the exclusive patronage system, then Section 15 is unconstitutional as an excessive delegation of legislative power to the

[7] The contribution of the conference system to the stabilization of ocean freight levels is strikingly illustrated at page 4 of the "40th Report of the Economic Cooperation Administration for the Public Advisory Board," issued as of September 30, 1951. Page 4 of the Report shows that between January 1950 and September 1951 world-wide tramp-ship rates increased 140%, as against a 25% increase in "liner" rates fixed under conference agreements.

Board; and (2) that the Board's orders of approval, if authorized by the statute, deprive Isbrandtsen of its property without due process of law. These contentions are without merit.

Section 15 requires that there be filed with the Board copies of agreements between common carriers by water which fix or regulate rates; provide for special rates, privileges or advantages; control, regulate, prevent or destroy competition; or provide for an exclusive or cooperative working arrangement.

The Board may disapprove, cancel or modify any agreement, even if previously approved, that it finds (1) to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, or (2) to operate to the detriment of the commerce of the United States or to be in violation of the Act. The Board is required to approve all other agreements.

Every agreement lawful under Section 15 is excepted from the anti-trust laws; and violations of Section 15 subject the violator to civil penalties at the rate of $1,000 a day.

While the complaint is not specific as to the basis of the law's unconstitutionality, we assume that the averment relates to the Board's authority to suspend the anti-trust laws. If such is Isbrandtsen's position, it is inconsistent with the relevant decisions of this court, which uniformly

support the power of Congress to suspend the anti-trust laws as circumstances require. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *United States* v. *Rock Royal Cooperative,* 307 U. S. 533, 560; *Tigner* v. *Texas,* 310 U. S. 141; *Liberty Warehouse Co.* v. *Burley Tobacco Cooperative,* 276 U. S. 71, 90. See also *United States* v. *Minnesota Mining & Manufacturing Co., supra,* 92 F. Supp. at 963. In *Sunshine Anthracite Coal Co.* v. *Adkins, supra,* this court said (310 U. S. at p. 404):

> Certainly what Congress has forbidden by the Sherman Act it can modify. It may do so, by placing the machinery of price-fixing in the hands of public agencies. It may single out for separate treatment, as it has done on various occasions, a particular industry and thereby remove the penalties of the Sherman Act as respects it. Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire. It is not powerless to take steps in mitigation of what in its judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other.

Liberty Warehouse Co. v. *Burley Tobacco Growers Cooperative,* supra, illustrates the broad sweep of the legislative power to except selected industries from antitrust restraints. There the

court upheld a Kentucky statute which (1) authorized farmers to form marketing cooperatives; (2) provided for the execution of exclusive marketing agreements between the cooperative and its members; (3) recited that such associations should not be deemed conspiracies, illegal combinations, or monopolies; (4) subjected third persons to criminal and civil penalties for inducing breaches of exclusive marketing agreements between the association and its members, and (5) authorized special penalties against warehousemen for inducing or permitting breaches of such contracts.

Under this authorization, a cooperative executed uniform contracts with many growers, binding them for five years to market all their tobacco through the association. The defendant warehouse company, a competitor of the association, sold on behalf of a grower, tobacco delivered by him to the defendant in violation of his exclusive association contract, and the association sued for the statutory penalty. The association recovered a judgment, which this Court affirmed, stating (276 U. S. at p. 97):

> The opinion generally accepted—and upon reasonable grounds, we think—is that the cooperative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as per-

> missible some discrimination intended to encourage agriculture. * * * And in many cases it has affirmed the general power of the states so to legislate as to meet a definitely threatened evil.
>
> * * * Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen.
>
> The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose. * * * A provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute does not invalidate it.

Sustaining of the Kentucky statute required a far greater measure of judicial indulgence than is needed to uphold section 15 of the Shipping Act as the Board construed it—since the monopoly created by Kentucky law was allowed to function free of public regulation, whereas conferences organized under the Shipping Act are subject to the continuous visitatorial power of the Maritime Board. If its conduct offends the statutory standards, a conference may be controlled or even destroyed by the Board through its power to modify

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or cancel the conference agreement and thereby protect the public interest.

In any event, there can be no doubt that Congress had power to exempt conferences from antitrust restraints; and having such power, it could pass it on, with suitable standards of guidance,[8] to the Board as its administrative delegate. *Sunshine Anthracite Coal Co.* v. *Adkins,* supra (310 U. S. at 400).[9]

Judge Frank suggested in his appendix to the district court's opinion (96 F. Supp. at 896) that Isbrandtsen's claim of unconstitutionality might have substance for the reason that the Board lacks statutory control over conference rates—which would mean that conferences, having power to restrict competition, would be subject to no restraint, either legal or economic, in fixing the level of their charges. The conclusion (if it is a conclusion) that the Board can not regulate conference rates is incorrect.

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[8] The standards of section 15 are more than adequately definite. The "just and reasonable" criterion is sufficient for rate-making delegation (*Tagg Bros.* v. *Moorehead*, 280 U. S. 420. And the "public interest" has been held a proper guide in various contexts (*New York Cent. Securities Corp.* v. *United States*, 287 U. S. 12, 24; *United States* v. *Chemical Foundation*, 272 U. S. 1; *Avent* v. *United States*, 266 U. S. 127. See also *Sunshine Anthracite Coal Co.* v. *Adkins*, supra, 310 U. S. at 398).

[9] The antitrust exemption in the Shipping Act was cited as an analogue to support a similar exemption of farmers under a State statute, in *Tigner* v. *Texas*, supra, 310 U. S. at 148.

Judge Frank's doubts as to the Board's rate powers relative to foreign commerce stem from the fact that in section 18 of the Shipping Act (46 U. S. C. 817) relating to carriers in *interstate* commerce, jurisdiction was explicitly conferred upon the Board to require "just and reasonable rates"—whereas no corresponding provision is found with respect to carriers in foreign commerce. See Shipping Act, sections 14–17 (46 U. S. C. 812–816).

It is not necessary to determine here whether the Act confers power over the reasonableness of the rates of *individual* carriers in foreign commerce, since it is clear that the Board has plenary control over the rates, as over all other activities, of *conference* carriers, such control being derived from the Board's authority under section 15 to revoke, cancel, or modify conference agreements at any time if such agreements are found detrimental to the commerce of the United States. Such is the Board's view of its own powers, as expressed in *Edmond Weil* v. *Italian Line,* 1 U. S. M. C. 395, in which the decision states (p. 398):

> An unreasonably high rate is clearly detrimental to the commerce of the United States, and upon a showing that a conference rate in foreign commerce is unreasonably high the Department will require its reduction to a proper level. If necessary, approval of the conference agreement will be withdrawn.

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See also *In the Matter of Rates, Charges, Rules, etc., of the Common Carriers, Parties to the Pacific Coast River Plate Brazil Conference Agreement,* (1939) 2 U. S. M. C. 28; *Pacific Forest Industries* v. *Blue Star Line,* 2 U. S. M. C. 54.

The Board's assertion of power to control conference rates in foreign commerce finds support in legislative history. Although Congress understood during its consideration of the Shipping Bill that it conferred no *general* power of rate regulation over individual carriers in foreign trade,[10] it understood equally well, as did the shipping industry also, that a different rule applied to conferences. This is indicated by the following passage from hearings on the bill, relative to the Board's rate-making powers:[11]

> The Chairman: They have that right in the coastwise, but I do not think its powers are quite that broad as to foreign trade, although I thought you gentlemen contended that the board was given the right to prescribe rates in the foreign trade.
>
> Mr. Dearborn: Ships working under conference agreement, as the bill reads, must submit those agreements to the board, *and their rates must be regulated to some extent, only applying to those in conference*

[10] See Hearings Before the Committee on Commerce. U. S. Senate, 64th Congress, 1st Session, on H. R. 15455, page 29, et seq.

[11] Id., p. 76.

> *agreements.* Of course, in the coastwise trade, they do regulate our rates. * * *

The Maritime Board's contention that it has plenary power over conference rates finds an exact parallel in the Civil Aeronautics Board's interpretation of its powers under section 412 of the Civil Aeronautics Act (49 U. S. C. 492), which is patterned after Section 15 of the Shipping Act. It requires the filing of certain air-carrier rate agreements, and provides for their disapproval by the CAB if it finds such agreements adverse to the public interest, or in violation of the statute. Under this provision the CAB recently held in *IATA Agency Resolutions Proceeding* (Docket No. 3350, January 26, 1951, —— CAB ——) that its power to disapprove rate agreements afforded an effective means of rate control. The examiner whose report the Board adopted said:

> It is urged by the IATA carriers that approval of the rates resolution would encourage stabilization of rates for foreign air transportation. Under an open-rate situation rate wars with their undesirable consequences to the carriers, the public and air transportation in general would be possible. Under the Act, the only jurisdiction the Board has over rates in foreign air transportation is that conferred by section 1002 (f) providing for the removal of discrimination. Thus, it is desirable for air carriers engaging in foreign air transporta-

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> tion to voluntarily avoid such wars between themselves as is the practice under the IATA rate procedure, provided that rates fixed are not unreasonable. In fact, with the Board limited in its jurisdiction over such rates, rate agreements which the Board may disapprove if it finds they provide for rates fixed at levels or upon principles which it considers inimical to the public interest, provide the only effective means to the Board for maintaining control over rates in foreign air transportation.

Serious considerations of regulatory policy have impelled the Board to forbear from the frequent exercise of direct control over the rates of foreign commerce carriers. These considerations have relation primarily to the circumstance that every voyage in foreign commerce is an international affair, involving ports of origin and destination within the jurisdiction of different sovereigns. If one of them undertakes to prescribe a specified level of rates for a carrier, the other is equally empowered to specify a different level.[12] Nevertheless, Congress provided in Section 17 of the Act (46 U. S. C. 816) that, in various situations, the rates of all carriers (even independents) were subject to direct control to protect the shipping public against discrimination; and in Section 15, it provided, in less specific but more

[12] See Hearings on H. R. 14337 (a predecessor of the Shipping Bill) before the House Merchant Marine Committee, 64th Cong., 1st sess.

inclusive language, that the rates of conferences were equally within the Board's jurisdiction through its power to insist on the avoidance of detriment to the commerce of the United States. Accordingly, Section 15 establishes a pattern for the complete protection of the public interest.

Section 15, validly delegating authority to the Board, avoids the pitfall of delegating governmental power to the shipping industry. The Maritime Board in this case has "authority and surveillance" over the conferences as the Bituminous Coal Commission had authority and surveillance over the code authorities in *Sunshine Anthracite;* and consequently, "Since lawmaking authority is not entrusted to the industry, this statutory scheme is unquestionably valid." (310 U. S. at 399.) The Board's action is not invalidated because it permitted the conferences to determine when the exclusive patronage system was to be made effective. See *Hampton & Co.* v. *United States,* 276 U. S. 394, 407; *Currin* v. *Wallace,* 306 U. S. 1, 15.

(b) *Approval of the exclusive patronage system is within the Board's power under Section 15 of the Shipping Act.*

It is helpful to emphasize not only what this case is, but what it is not. It is not a case under the antitrust laws (as is *Far East Conference* v. *United States,* No. 15 Misc. on the current docket) but rather is the antithesis of such a case, involving as it does a statute providing for

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a sweeping antitrust exemption, conferred upon the shipping industry for special reasons affecting the public interest. That statute is entitled to the same measure of judicial respect as the antitrust laws themselves. The proper canon of interpretation is that which Judge Wyzanski recently applied to the Webb-Pomerene Act (another exempting statute) in *United States* v. *Minnesota Mining & Mfg. Co., supra* 92 F. Supp. at 965:

> * * * The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted. And the courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function.

The antitrust exemption under the Shipping Act is contained in Section 15. This case must, of course, be decided not under Section 15 alone, but under the Act as a whole. Nevertheless, the two provisions chiefly relevant to this case being Section 15 and Section 14 Third, we shall consider them separately, first discussing the Board's power to approve the exclusive patronage system under Section 15; and then inquiring whether, if the power is so conferred, it is negated by the third paragraph of Section 14.

The language of Section 15 seems clearly to permit the Board to approve conference agreements authorizing member lines to contract for

the exclusive patronage of shippers, since the agreements subject to approval thereunder include those—

> * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or *destroying* competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an *exclusive,* preferential, or cooperative working arrangement.

The Board is directed to approve such of the foregoing agreements as are not found by it to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act." It is directed to approve all other agreements.

It would be fair to conclude from section 15 alone, without extrinsic support, that since Congress recognized steamship conferences as legitimate instruments of ocean commerce, it must have intended to sanction the use by conferences of such working arrangements and contract re-

lationships as would further the conference objective. Congress could not reasonably have authorized, as in section 15 it did authorize, the establishment of shipping combinations with power to enter into contracts and arrangements "controlling, regulating, preventing, or destroying competition . . ." and embodying "exclusive preferential, or cooperative" working arrangements, without permitting the conference members, subject to the consent of the agency established to regulate them, to adopt such measures as would render the conference system effective—the exclusive patronage system being one such measure.

The Board contends that the exclusive patronage system is an "essential sanction" under the Shipping Act which must be permitted in proper cases if the Act is to serve its purpose of permitting the regulation of unrestricted maritime competition. If the exclusive patronage system were to be outlawed by judicial interpretation—

> The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question. (*Sunshine Anthracite Coal Co.*, v. *Adkins, supra,* 310 U. S. at 392).

Isbrandtsen and the Attorney General argue that the Board attributes excessive scope to the

Section 15 exemption from the antitrust laws. They claim that Section 15 authorizes the regulation of competition only *among the member lines within a conference,* but not between conferences and independent lines. The argument, as it relates to Section 15, rests upon the theory that Section 15 requires the filing and authorizes the approval of only two types of agreements: (1) agreements between common carriers; and (2) agreements between common carriers and "other persons subject to the Act"—which expression as defined in Section 1 (46 U. S. C. 801) does not include shippers. Accordingly, the contention comes to this—that since the Board may not approve an agreement between a carrier and a shipper, it may not approve a system of exclusive patronage based upon a series of agreements between the conference and the shippers who patronize it.

To support this contention would necessitate abandonment of the "essential sanction" doctrine of *Sunshine Anthracite,* and would substantially nullify the regulatory system which Congress adopted. That system is based upon licensed restraints of competition among carriers. Carriers can conduct their business competitively or otherwise, only through contractual dealings with those whose freight they carry. To deny their right, as conference members, to execute agreements with shippers in such terms as reflect the carriers' authorized competitive practices would be to deny the power of the conference system to function.

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The provision in section 15 that "every agreement * * * lawful under this section shall be "excepted" from the antitrust laws means (unless it is meaningless) that every conference agreement *and the activities authorized thereunder* shall be excepted from the antitrust laws. To attack shipper contracts executed within the scope of authorized conference activity pursuant to the basic conference agreement would be to attack, and substantially to invalidate, the conference agreement itself. The problem bears a resemblance to *Central Transfer Co.* v. *Terminal R. R. Co.,* 288 U. S. 469, where the court said (p. 476):

> True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission.

The present case differs from *Central Transfer* in that there the agreement under attack was

beyond the jurisdiction of the Interstate Commerce Commission although the acts performed under the agreement were within its jurisdiction; whereas here, not only the acts performed, but the agreement pursuant to which they were performed, are clearly within the jurisdiction of the Maritime Board, under Section 15 of the statute.

The agreements contemplated by section 15 are such as may (subject always to the Board's control) wholly "prevent" or "destroy" competition, or grant "exclusive" rights.[13] Only by a process of distortion could a statute authorizing destruction of competition be interpreted as a mandate that competition be preserved. It is apparent on the face of the statute that the types of agreement which Congress had in contemplation were not merely those which might prevent conference members from competing with each other, but also those restrictive of *all* competition. No such qualification as that for which Isbrandtsen and the Attorney General contend can fairly be interpreted into the unequivocal language employed by Congress.

This conclusion is substantiated by other parts of the Shipping Act, notably paragraphs First and Second of Section 14. Section 14 First forbids the use of deferred rebates (a special device for tying shippers to conference carriers) and Section

[13] There is no evidence, however, that competition was destroyed in the North Atlantic trade even when the exclusive patronage system was in use before World War II.

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14 Second forbids the use of fighting ships. Both of these restrictions serve to protect operators who are *not* members of a conference, against specified forms of conference restraint. Had section 15 been thought by Congress to afford full protection to nonconference operators against restraints of competition by conferences, paragraphs First and Second of section 14, insofar as they affect conferences, would have been unnecessary. Those provisions indicate the understanding of Congress that nonconference operators were, under Section 15, vulnerable to certain forms of conference restraints upon their competition, and manifest an intent to establish limits beyond which such restraints should not be authorized.

The legislative history of Section 15 supports our interpretation of its provisions. The chief historical document is a four-volume "Investigation of Shipping Combinations" undertaken by the House Merchant Marine and Fisheries Committee under House Resolutions 425 and 587, 62nd Congress, and 205 in the 63rd.

The Committee,[14] in the Report of its investigation, said (pp. 415 et seq.):

> In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two

[14] The investigation was directed by the Committee Chairman, Rep. Joshua Alexander, and the report of its activities is commonly called the Alexander Report. The Report proper occupies the 4th volume of the study.

courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses. It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. * * *

These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that *open competition cannot be assured for any length of time by*

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ordering existing agreements terminated. The entire history of steamship agreements shows that *in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade.* Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.

The Committee further observed (p. 295) that conference agreements—

> * * * are held to furnish the means for taking care of the disabilities of the weaker lines, whereas unrestricted competition based upon the survival of the fittest, tends to restrict the development of the lines and in the end must result in monopoly.

After a résumé of the advantages and disadvantages to the public resulting from steamship conferences (for a full summary of which, see its Report, pp. 295–307), the Committee set forth seven specific recommendations (Report, pp. 419–421) which are set forth in Appendix B, infra.

The Alexander Report and recommendations, together with other legislative proceedings antecedent to the passage of the Shipping Act, show conclusively that its draftsmen did not sponsor it as a measure for the promotion of competition. On the contrary, they explicitly recognized the restrictive character of steamship conferences, and after balancing the advantages and disadvantages to the public of the conference system, they recommended that it be legitimatized by statute, subject to regulation and control by a public agency. As above noted, the Committee said (Report, p. 416):

> It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated.

Neither did the Committee believe that "open competition" would result from legalization of the conference system—nor that open competition was a desirable objective in ocean transportation. Indeed, it observed that "*the conference system largely results in placing rates outside the influence of competition . . .*" (p. 298).

While the Committee did not favor the elimination of competition as an end in itself, it recognized that control of competition was essential because conditions in ocean transportation were such as to promote recurrent rate wars which disorganized the service, impaired its quality, promoted discrimination against small shippers, discouraged forward trading, and ultimately resulted in monopoly through the process of extermination of weak lines or their absorption by strong ones.

Accordingly, the Committee suggested a formula for the termination or control of these evils, based upon preservation of vital features of the conference system, but subject to complete prohibition against a few practices as specified in Section 14, and subject as to other practices, to supervision by a public agency. The basic scheme preserved the established system of allowing conference carriers to regulate competition except as Section 14 forbade specific abuses.

The Committee was well aware that conference activities had been directed against competition

of two types: (1) *internal* competition, between and among members of the conference; and (2) *external* competition, between the conference members as a group, and outsiders (See Report pp. 281, 282–287, 287–293). Under the heading "*The regulation of competition between the lines, parties to the agreement or conference,*" the committee discussed a list of practices as set forth at pp. 282–287 of its Report. Under the heading "*Meeting the Competition of Lines Outside the Conference,*" the Committee discussed (1) deferred rebate systems, (2) the use of fighting ships and (3) various types of contracts with shippers. Among such contracts were those of precisely the type involved in the present case, which were described in the following terms (Report p. 290):

> Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e., are willing at all times to contract with all shippers on the same terms.

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These exclusive contracts with shippers were not described in the terms of condemnation that the Committee in its Report (pp. 287–290) and Congress in section 14 applied to deferred rebates and fighting ships. In no instance except with respect to deferred rebates and fighting ships did the Committee signify an intention to deprive the conferences (under the Board's supervision) of power to regulate or control competition between the conference lines and outsiders, as distinguished from competition between the member lines of the conference itself. Rather it suggested prohibitions against major abuses relating to both types of competition, with no suggestion that it should be illegal to project competitive restraints beyond the conference organization.

The Board recognizes, of course, that one of the purposes of the Shipping Act was to prevent conferences from driving independent carriers from their trade routes. See, for example, Congressional Record, Vol. 53, p. 8057. The Board's predecessors have given effect to that purpose by compelling conferences to admit qualified applicants to membership. See *Pacific Coast European Conference Agreement,* 3 U. S. M. C. 11; *East Asiatic Co. Ltd. v. Swedish American Line,* 2 U. S. M. C. 41. Isbrandtsen's non-conference status represents his voluntary choice of independence (R. 299).

An indication that Congress deems independent lines sufficiently protected, if their right to conference membership is assured is found in section 810 of the Merchant Marine Act, 1936 (46 U. S. C. 1227), forbidding payment of subsidy to a line engaging in concerted action that is unfair or unjustly discriminatory to other American carriers. The legislative history shows that Congress was concerned to preserve the *right of access to conference membership* by independent lines. Senator O'Mahoney, sponsor of this provision, said (Cong. Rec., Vol. 80, p. 10075–76):

> I am told that the Shipping Board in the past has not enforced the law which so clearly provides that American lines, on application, are entitled to admission to any conference. A *closed* combination of this kind is indefensible, and surely should not be supported by the Treasury of the United States.

Certain conference practices were recognized by the Alexander Committee as abuses so detrimental as to call for outright prohibition. Other practices were found to be blends of good and evil and for that reason, to be proper subjects for regulation rather than prohibition (Report, pp. 416–421).

One of the explicitly condemned practices was the deferred rebate system (more particularly discussed *infra*, p. 90), of which the Committee said (Report, p. 307):

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> By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners *effectively tie the merchants to a group of lines for successive periods* (p. 307).

In the next sentence, the Committee took note of the contract system, of which it said:

> In this connection it is argued that *the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system* (p. 307).

Following its reference to the deferred rebate system, and to the difference between it and the contract system, the Committee observed as to the deferred rebate system, but *not* as to the contract system, "that the system is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature" (p. 307).

The Committee found that the advantages of conference operation, such as regularity and quality of service (Report, pp. 295–303) and equal treatment of large and small shippers (Report, p. 300), could be secured "only by permitting several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control" (Report, p. 416). Since, in its discussion of the deferred rebate system and the contract system, the Committee found that the deferred rebate system was unnecessary to secure "excellence and

regularity of service," and since it made no such finding relative to the contract system, the inference is inescapable that the Committee intended to outlaw deferred rebates and to authorize (or at least permit the Board to authorize) exclusive contracts. Any doubt on this point should be dispelled by the fact that the Committee was recommending legislative acceptance of a system which "largely results in placing rates outside the influence of competition" (p. 298). Deferred rebates being outlawed, how, except by the contract system, could this be done?[15]

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[15] Also relevant is the fact that various bills from which Congress evolved the Merchant Marine Act, 1936, provided for the use *by conferences* of deferred rebates in consideration of agreements for exclusive patronage—e. g., H. R. 8555, 74th Cong., 1st Sess., sec. 1106; H. R. 7521, 74th Cong., 1st Sess., sec. 1006; S. 2582, 74th Cong., 1st Sess., sec. 1106. H. R. 8555 contained such a provision when it passed the House. None of these bills referred to the dual rate contract system. Clearly, they would have done so had the draftsmen doubted that the system was lawful for conference use.

The Eastman Bill (S. 1632, 74th Cong., 1st Sess.) provided for transfer of regulatory power over all water carriers to the Interstate Commerce Commission. It was favorably reported by the Senate Committee on Interstate Commerce, and as so reported, incorporated verbatim the provisions of sections 14 and 15 of the Shipping Act, notwithstanding that Mr. J. W. Ryan, on behalf of Isbrandtsen Moller Co., a predecessor of the present Isbrandtsen Company, which operated foreign-flag ships had submitted a strong statement in opposition to the contract system (Hearings on S. 1632, 74th Cong., 1st Sess., pp. 1274–77). The Committee apparently did not regard the system with disfavor since it did not amend the bill to forbid its use. After the bill was reported to the Senate, no further action was taken thereon.

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When the shipping bill (H. R. 15455, 64th Congress) was debated in Congress, it was characterized as carrying out the recommendations in the Report of the Alexander Committee. Chairman Alexander, in explaining the bill, said (53 Cong. Rec., p. 8077):

> * * * As a result of our investigation we were confronted with the question whether or not we should recognize the agreements existing between carriers by water or recommend that the Sherman antitrust law should be enforced against them and these combinations be broken up * * *
>
> After giving thorough consideration to this grave question and after taking into consideration the arguments made before our committee by the ablest representatives of the foreign lines as well as of the domestic lines, we concluded that many of the provisions of the agreements under which combinations were operating were not objectionable; and hence we recommended reasonable regulation rather than that the combinations might be broken up. That decision was influenced by the consideration that if we would break up these combinations and restore destructive competition it would ultimately lead to consolidation and monopoly. Hence, after giving the question thorough consideration, we recommended that our water-borne commerce, domestic and foreign, should either be brought under supervision of the Interstate Commerce

> Commission or some other body having jurisdiction.

The bill, however, was not regarded as prescribing a ban against every conceivable restrictive practice. Rather, it was recognized as being aimed, *selectively*, at *particular* practices. For example, Mr. Burke, a member of the Merchant Marine Committee, said in addressing the House (53 Cong. Rec., p. 8095):

> It was found by your committee that many of the unfair practices had become so firmly established *and contained in many instances elements of usefulness* that, with the exception of some of the more prominent ill practices, it was considered that a system of regulation and control of water transportation would be for the best interest of both the public and those interested in water transportation * * *. Consequently the conclusion was forced upon the committee that the advisable thing to do was to create a new board or commission, to be known as the shipping board.

These quotations show that the bill was understood to forbid some but not all of the "unfair" practices of the steamship conferences—the practices not specifically forbidden being left to the regulatory supervision of a shipping board having power to weigh advantages against disadvantages of particular practices in particular cases. In the understanding of the legislators, the board's

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power in the field of definition and control of unfair practices was absolute. Mr. Burke said (53 Cong. Rec., p. 8096):

> * * * In fact, it (the board) is invested with full and complete power and authority to prevent abuses and discriminations and to enforce regulations *made by it* for the proper protection of the interest of shippers, boat owners, and all concerned * * *.

Mr. Saunders, also a member of the Merchant Marine Committee, said of the provision which became section 15 (53 Cong. Rec., p. 8106):

> Mr. Chairman, the above provision is designed to enable the commissioners to intelligently discharge their duties. It advises them as to the situation. It informs them as to the relationship of the carriers. It apprises them of unfair practices. It puts the board in a position to deal discreetly and wisely with these great issues that are submitted to *its control and its direction.* * * *

While the Report itself does not emphasize the peculiar importance of the conference system to United States-flag carriers, their special handicap resulting from high cost of operation was referred to in debate by Representative Fess (53 Cong. Rec., p. 8190):

> * * * The Republican party insists on maintaining the wage standard. It well

> knows that the inability [sic] of *open competition* on the sea has driven our commerce off the sea.

The continuing necessity of the conference system to the survival of the American merchant marine was again recognized in 1950 in an investigation by the Magnuson Subcommittee of the Senate Committee on Interstate and Foreign Commerce (Report 2494, 81st Cong., 2nd Sess.), which said (p. 86):

> It must be clearly recognized that the conference system has assisted in the establishment of an American merchant marine where before it had little chance of survival. Before 1914, we carried only 9.4 percent of our foreign trade in our own ships. The rates have been set high enough to allow the American operator to at least meet his out-of-pocket costs of operation, and while the foreign operator has many advantages, not the least of which is greater profits on his operation, the fact remains that from the standpoint of national security and from the point of view of the American shipper, the conference system has paid off in stability of rates and improved quality of service.

The North Atlantic Continental Freight Conference consists of 11 lines, of which 7 operate under foreign flags and 4 under the United States flag (R., 594). The necessity to protect the

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minority of United States flag carriers against competition of this magnitude, is obvious.[16]

One of the principal controversies in Congress relative to the shipping bill was whether it would tend to socialize the shipping industry through its provisions for government ownership and operation; and whether it would not be preferable to grant direct subsidies for private operation—a system eventually provided for in the Merchant Marine Act, 1936. The need for subsidies or other form of Government aid was recognized as arising from the relatively high cost of ship operation under United States registry. Congress,

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[16] The preamble of the Merchant Marine Act, 1936, reads in relevant part as follows:

Section 101 (46 U. S. C. 1101). It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

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being aware of these matters, must have realized clearly the special importance of rate stability to United States flag carriers operating in competition with the carriers of other nations; and no suggestion has been heard from Isbrandtsen or any other source, as to how an unsubsidized United States flag carrier having higher costs than foreign lines can successfully maintain itself in "open" or "unrestricted" competition against them. Mr. Isbrandtsen, when interrogated on this subject, could answer only that "If there were no conferences, I would get along anyway." (R., 311). While denying that he systematically undercuts conference rates (a statement which his tariff substantially refutes—see Ex. 12 (a) (R., 1130)), Mr. Isbrandtsen testified that the "philosophy" and "theory" of his company were those of a tramp operator (R., 312). In discussing tramp steamers (as affected by the deferred rebate system), the Alexander Committee said in its Report (p. 314):

> Most of the important complaints from shippers against deferred rebates have come from large firms whose shipments are frequently of such size as to justify the employment of tramp steamers. These firms object to being tied to the regular lines to the exclusion of the use of tramps. In other words, they wish to employ a tramp whenever it suits their convenience, at the same time, insisting that the regular

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lines, whose service is naturally dependent upon the regular support of shippers, be ready at all times to take their shipments when they do not desire to use tramps, i. e., they insist on the regular lines carrying out their promises relative to speed, good service and regularity, without, however, being able to rely upon the shippers' constant support.

(c) *The exclusive patronage system is not prohibited by section 14 Third of the Shipping Act.*

We have shown in the foregoing discussion not only that nothing in the language or purpose of section 15 of the Shipping Act forbids the Board to authorize the use of the contract system, but also that Congress quite definitely contemplated its use. But section 15 does not stand alone; and the scope of the Board's authority ultimately depends on the question whether powers conferred in general terms by section 15 are offset by the more particularized provisions of section 14. The answer is that some are and some are not—and the power to authorize the contract system is not.

In *United States Navigation Co.* v. *Cunard S. S. Co., supra,* this Court refused to enjoin the use of the exclusive patronage system under the Sherman Act, holding that the case must first be considered by the Shipping Board. The plaintiff claimed that reference to the Board would be futile because the Board could in no event ap-

prove a dual-rate, exclusive patronage arrangement. The Court said (284 U. S. at 487):

> It is said that the agreement referred to in the bill of complaint cannot legally be approved. But this is by no means clear.
>
> * * * * *
>
> * * * whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although *an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.*

Congress, as we have shown, was familiar with the contract system, and, as evidenced by the Alexander Report, was capable of discussing it, and did in fact discuss it (as it discussed deferred rebates and fighting ships) in explicit and comprehending terms. It is, therefore, fair to assume that if Congress meant to prohibit the contract system (as it prohibited deferred rebates and fighting ships), its prohibition would have been expressed in terms no less explicit and comprehensible than its other references to the same subject and other subjects. For example, the

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law, had Congress so intended, could readily have said: "The exclusive patronage contract system is hereby prohibited." No such provision is found in section 14 or elsewhere, and no provision of the Shipping Act may fairly be construed as equivalent to the suggested language.

The provision most directly relied upon by Isbrandtsen and its supporters as indicating that section 14 prohibits the contract system, is paragraph Third. The section provides in relevant part:

> SEC. 14. That no common carrier by water shall * * *
>
> Third. (a) Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or (b) resort to *other discriminating or unfair methods*, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.[17]

The Board's position is that publication by the conference of a dual rate scale, the lower or contract rates being available to shippers who contract to use conference lines exclusively (higher non-contract rates being charged all others) is not a measure of retaliation or "other discriminating or unfair method" within the meaning of section 14 Third. It is not an act of retaliation because, as the Board said in its decision (R. 60):

[17] The letters (a) and (b) have been inserted for ease of reference.

> * * * To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as "to return like for like" or "evil for evil." Retaliation perhaps connotes the idea of vengeance. Such conduct among carriers in their relations with shippers is in our judgment the evil which section 14 (3) was designed to prohibit. We cannot view the adoption of the dual rate system or the charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage as a "retaliation" * * *.

The assessment of the higher rate against a non-contract shipper should not be treated as an "other discriminating or unfair method." We think it clear that these words mean "*unjustly* discriminatory or other unfair methods"—and the Board has found that the system is *not* unjustly discriminatory or unfair. This interpretation alone fits the pattern of the Shipping Act as a whole. Thus, in Section 15 of the Act (46 U. S. C. 814), the only discriminatory agreements condemned by Congress are those which are *unjustly* discriminatory or unfair. Under Section 16 (46 U. S. C. 815), the Act forbids shippers to obtain transportation below the regular rates by false billing, false classification, false weighing, etc., or any other *unjust or unfair* device or means. The same section forbids carriers to confer *undue* or *unreasonable* preferences or advantages, or to subject shippers or traffic to *undue* or *unreason-*

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able prejudices or disadvantages. Section 17 (46 U. S. C. 816), in terms slightly different from Section 16, forbids carriers to charge rates or fares which are *unjustly* discriminatory or *unjustly* prejudicial to specified persons. The same section commands the observance of *just* and and *reasonable* regulations and practices relative to receiving, handling, storing, or delivering of property. The Board is granted power to assure that such practices are *just* and *reasonable*. Under Section 18 (46 U. S. C. 817) it imposes corresponding duties, in terms of *justness* and *reasonableness*, upon common carriers by water in interstate commerce.

It is thus seen that the uniform purpose of Congress, throughout the Shipping Act—as throughout the Interstate Commerce Act—has been to assure, *not* that *all* preferences and discrimination be prohibited, but merely such preferences and discriminations as the Board finds to be unjust, unreasonable, or unfair.

Isbrandtsen claims that the omission of the word "unjustly" before the word "discriminating" in section 14 Third means that the section must be construed differently from the other sections of the Act as an outright prohibition against any discriminatory treatment whatever, without regard to its unfair or unjust character as measured by the standards set forth in other sections of the Act. Isbrandtsen emphasizes (1) that the

Alexander Committee, in submitting its recommendations (Alexander Report, p. 421), included a recommendation (No. 6) that "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available or by resorting to other *unfair* methods of discrimination because such shipper has patronized an independent line . . ."; and (2) that in section 14 Third as finally enacted, the Alexander Committee's reference to "other unfair methods of discrimination" was transmuted to "other discriminating or unfair methods." This, says Isbrandtsen, shows that Congress rejected the Alexander Committee's proposal to outlaw *unfair* discrimination only, by substituting a provision to outlaw all discrimination, unfair or otherwise, in the circumstances covered by section 14 Third.

Isbrandtsen misconceives this fragment of legislative history. It is not true that Congress overruled the Alexander Committee. The fact is that the Committee itself was responsible for the change of language between recommendation No. 6 in its original report and section 14 Third as finally passed. This appears from the final report of the House Merchant Marine Committee on H. R. 15455, which was the Committee's final version of the shipping bill (Report No. 659, 64th Cong., 1st Session). The language of section 14 Third as finally enacted, is identical with the language recommended by the Committee itself,

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showing that Congress accepted the Committee's draft without alteration. There is no suggestion in the Committee's final report on the bill that it intended section 14 Third in its final form to have a different meaning from recommendation No. 6 as set forth in its investigatory report. On the contrary the final report on the bill *explained its provisions by quoting verbatim the earlier recommendations,* including recommendation No. 6 which contained the expression "*by resorting to other unfair methods of discrimination*" (See Report No. 659, 64th Cong., 1st Session, p. 30). Since the new language was *explained in terms of the old,* it is apparent that it must be identically interpreted.

Assuming, however, that the system of exclusive patronage as here presented is held to involve retaliation against, or discriminatory treatment of non-contracting shippers, it nevertheless avoids the ban of the statute because the retaliation or discrimination is not applied against them *for patronizing any other carrier*—since the higher, or non-contract rate scale is paid by every shipper not signing a contract, and is paid *whether or not he has patronized another carrier.*

Payment of the higher rate is the consequence, not of patronizing another carrier, *but of not signing a contract;* and a shipper who may in fact ship all his cargoes via conference vessels will nevertheless be required to pay the non-contract rates unless he has executed a contract. In this

respect, the nonsigning shipper who may patronize the conference exclusively is in the same position as the nonsigning shipper who ships partially or exclusively via nonconference lines.

Section 14 Third is a statutory adoption of the common law as expressed in *Menacho* v. *Ward*, 27 Fed. 529. In that case two steamship lines engaged in the New York-Cuba trade had increased their rates to plaintiffs because plaintiffs had made shipments via tramp carriers in the trade. The shippers applied for and were granted an injunction against the imposition by defendants of the higher charges. *The case did not involve a contract between the shippers who paid the lower rates and the defendant carriers*—a circumstance which influenced the decision. The Court said (p. 533):

> The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainant's carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them. *Such a consideration might be influential in inducing parties to contract in advance;* but it has no legitimate bearing upon the value of services rendered *without a special contract*, or which are rendered

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> because the law requires them to be rendered for a fair remuneration. * * *

The necessary inference from the italicized passages in the foregoing quotation is that if shippers *had agreed in advance* to ship exclusively via the defendant carriers, a rate differential in their favor would have been justifiable. In the absence of such agreement, the differential was unlawful as constituting a clear retaliation and discrimination, and the conduct of the carriers which the Court enjoined was of precisely the sort subsequently prohibited by section 14 Third of the Shipping Act.

The distinction suggested in *Menacho* v. *Ward* is substantial, not technical. In the absence of a contract for exclusive patronage, the carrier has no *right* to expect it, and has no means of securing it except through retaliation or threat thereof against non-exclusive shippers. If, however, the carrier has secured by agreement the shipper's promise of exclusive patronage for a stated period, the promise justifies the carrier's reliance thereon. The carrier derives a benefit from the shipper's agreement, and in return may offer a *quid pro quo* in the form of a lower rate. As stated in *United States* v. *Prince Line*, 220 Fed. 230, 234 (reversed as moot 242 U. S. 537):[18]

[18] This case (decided in 1915) held that the deferred rebate system did not violate the Sherman Act. While the law was eventually established to the contrary, first by *Thomsen* v. *Cayser*, 243 U. S. 66, and thereafter by statute, the reasoning

> A line providing regular sailings and undertaking to furnish sufficient space will presumably learn by experience enough of conditions at the several ports at different seasons to enable it to calculate with reasonable accuracy what amount of cargo it may expect from its shippers for any particular sailing. Making provision accordingly, the vessel sailing will take her departure with substantially a full cargo. But if, when she reaches port, it is discovered that the calculations as to expected cargo were correct, but that some of her largest regular shippers had sent their merchandise off the week before by some tramp steamer, the regular vessel will have to sail with much unfilled cargo space. A few experiences of this sort might well involve a loss equal to, if not in excess of, the 10 per cent.

Isbrandtsen and the Attorney General contend that the system under attack is not saved by the signing of a contract, since a contract signed by a shipper in response to the lure of cheaper rates is a contract imposed by coercion. Their contention is unsound, however, because a shipper who exercises a choice to sign an exclusive contract in return for a lower rate scale is no more coerced than any other contractor who, before entering into an engagement, weighs its benefits

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of the *Prince Line* case applies in principle to the contract system and has not been repudiated by any later authority known to us.

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against its handicaps, knowing that he must assume the latter to enjoy the former. So reasoned the court in *Lough* v. *Outerbridge*, supra, which, in upholding an exclusive contract, said (143 N. Y. at 280):

> The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable.

See also *Mogul S. S. Co.* v. *McGregor* (1892) 17 App. Cas. 25, where Lord Halsbury, for the House of Lords, said of freight concessions granted in return for exclusive patronage that "if this is unlawful, it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful" (p. 36).

Whether the system is or is not "coercive" in the dictionary sense, however, is not a question of vital importance—for if a system of exclusive patronage is held proper in the public interest, some measure of inducement for shippers to sign contracts must be recognized as inherently necessary. As stated in the Board's opinion (R. 63–64):

> If the conference members are to provide the service which the shippers value, the service must be matched by a regular avail-

> ability of cargo from those shippers. The conferences realize that to sustain these mutual benefits, something more than voluntary shipper cooperation must be agreed to.

The Board's position is sound under the decisions of this court, which said in *Sunshine Anthracite Coal Co.* v. *Adkins, supra* (310 U. S. at 401):

> Coercion is the very essence of any penalty exacted for failure of submission. "It is of the essence of the plenary power conferred" by the commerce clause "that Congress may exercise its discretion in the use of the power." *Currin* v. *Wallace,* supra (306 U. S. p. 14, 83 L. ed. 450, 59 S. Ct. 379). A part of that discretion is the selection of the sanction for the law's enforcement. Discrimination constitutionally may be the price of noncompliance.

And in *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative,* supra, the Court upheld the validity of statutory and contractual penalties (somewhat resembling the damage provisions of the contracts here involved) under a Kentucky marketing cooperative statute, upon the ground that without such sanctions, the policy of the law could not be accomplished (276 U. S. at 95–96).

Having provided for the conference system under section 15, Congress should not be presumed to have taken away, by section 14, powers which, as indicated by the legislative history, were con-

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sidered essential to successful conference operation. We attach significance in this connection, to evidence in the language and structure of section 14 that *insofar as the exclusive patronage contract system is concerned,* Congress intended by section 14 no restriction upon the Commission's powers *over conferences* as conferred by section 15.

Section 14 First prohibits deferred rebates. The legislative history is explicit that Congress intended to outlaw the deferred rebate practice by all carriers, *conference and nonconference alike.* Section 14 First is appropriately drafted to carry out this intent. It forbids common carriers to "pay, or allow, *or enter into any combination, agreement, or understanding,* express or implied, to pay or allow, a deferred rebate to any shipper." The italicized words exclude any possibility of argument that deferred rebates might be authorized as a proper practice either for independent carriers or for conference carriers.

Section 14 Second forbids the use of a fighting ship by a common carrier, "either separately *or in conjunction with any other carrier, through agreement or otherwise.*" The italicized words have the same significance as the italicized words in the excerpt quoted from section 14 First. A conference may not use a fighting ship with greater impunity than may an independent carrier.

Section 14 Third and (to the extent here relevant, if at all) section 14 Fourth, are to be dis-

tinguished from paragraphs 14 First and Second in that they contain no reference to conferences, combinations, or agreements, but merely provide that "no common carrier by water shall, directly or indirectly," perform acts forbidden by those two paragraphs. The omission of Congress to extend by specific language the prohibitions of paragraphs Third and Fourth to combinations of carriers, such prohibitions having been specifically so extended in paragraphs First and Second, indicates that whereas the practices enumerated in paragraphs First and Second are forbidden to individual carriers and conferences alike, those enumerated in paragraphs Third and Fourth may, when authorized by the Board, be permissible for conference carriers, whose practices are subject to Board regulation. The extra measure of power which the Board exercises over conferences, as compared with independent carriers, fully justifies the difference in treatment between conference and nonconference lines.

In outlawing the deferred rebate, Congress took considerable pains in defining the term as—

> * * * a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the

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> shipper has complied with the terms of the rebate agreement or arrangement.

Obviously, the factor of concern to Congress was not the rebate, but the *element of deferment*. Except for that feature, with its tendency to tie the shipper recurrently or perpetually to the carrier, the deferred rebate system and the contract system are much alike in operation and effect. Had Congress been concerned with the *exclusiveness* of the shipper-carrier relationship, it would have merely prohibited the contract system; and it would thereby, automatically, have proscribed the deferred rebate system as well.

But instead of legislating in this way, Congress carefully focused its attention on deferred rebates, and by great precision of draftsmanship in defining that term, excluded the contract system from the scope of the definition. It seems clear that the meticulous definition of the term "deferred rebate," can have no meaning except that Congress was knowingly and advisedly legislating not *against* the contract system, but *around* it.

In *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297, this Court said (p. 307, note 3):

> The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, *because it operated to tie shippers to a group of lines for successive*

periods, and because the system "is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature." See, e. g., pp. 103–105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as "deferred rebates," since it does not place him in "continual dependence" on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. *W. T. Rawleigh Co.* v. *Stoomvaart,* 1 U. S. S. B. 285. The policy of the statute *may*[19] properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.,* 1 U. S. S. B. 41.

Swayne & Hoyt is frequently mis-cited by opponents of the contract system as evidencing disapproval of that system by this Court. *Swayne & Hoyt* was instituted to review the order of the Shipping Board Bureau (a predecessor of the present Maritime Board) in *Gulf Intercoastal Contract Rates,* 1 U. S. S. B. 524, in which the Bureau had forbidden use of the contract rate

[19] "May," not "must."

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system by conference carriers *in the intercoastal trade,* the rates in which were and are subject to the Intercoastal Shipping Act, 1933 (46 U. S. C. 843). The conference sought to justify its contract rate system on the ground that "* * * several years ago after the inauguration of the Gulf Intercoastal service, the trade was seriously disrupted by vicious rate-cutting practices, resultant rate wars, and so forth, which condition proved not only very unsatisfactory to the steamship lines themselves, but also to the shippers" (1 U. S. S. B. 524, 528). Of this argument, the Bureau said (1 U. S. S. B. at 528-529):

> It should be remembered, however, that at the time referred to by the witness, carriers engaged in intercoastal transportation were only required to file their maximum rates. Nothing in the law then in force prevented them from collecting compensation for their services lower than such maximum rates. The law at present in effect not only requires such carriers to file the rates which they charge for transportation, from which they are prohibited to depart, but also prescribes an orderly manner for changing the rates. This includes thirty days' notice to the public, and this department is given the power to suspend, upon complaint or upon its own initiative without complaint, any proposed change pending a hearing concerning its lawfulness.

The Bureau distinguished conditions in domestic trade, under the Intercoastal Shipping Act, from conditions in the foreign trade:

> Operators of vessels in our foreign commerce may at any time and without warning be subjected to severe competition by tramp vessels of any nation. Unlike the intercoastal trade, there exists no statutory requirement that changes in rates be published thirty days in advance, nor is the department given any power to suspend such changes. In so far as ocean tramps in foreign commerce are concerned, they are subject to no regulatory authority whatsoever (1 U. S. S. B. 524, 529).

The Bureau used the foregoing language to justify the difference between its policy relative to the contract system in intercoastal commerce and its corresponding policy with reference to foreign commerce (Cf. *Rawleigh* v. *Stoomvart,* 1 U. S. S. B. 285). *Swayne & Hoyt* recognized the validity of the distinction (300 U. S. at p. 305):

> Before the enactment of the Shipping Act in 1916, there was no Congressional regulation of rates and practices of water carriers. By § 18 of the Act, the carriers were required to file only their maximum rates, which left them free to indulge in rate wars. Under §§ 2 and 3 of the Intercoastal Shipping Act of 1933, they are required to file schedules specifying their rates, which are subject to change only on thirty days' notice, and examination by

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> the Board as to their lawfulness, with power in it to suspend the rate pending investigation. We cannot say that cut-rates for "tramp" and "distressed" tonnage, which, according to appellants' witnesses, are the principal menace to rate stability, would not be substantially deterred by these requirements. The chairman of the Conference admitted that the 1933 statute "has to a certain extent eliminated the condition necessitating the contract rate system." In addition may be mentioned the testimony of shippers who favored the contract rate system, but admitted that they had had no difficulty with the stability of the service in their shipments from Atlantic ports, where the conferences have not adopted a contract system. *We think there was evidence from which the Secretary could reasonably conclude that there was little need for a contract rate system to assure stability of service.*

The question was not whether the Court should affirm an order *supporting* the contract system, but *whether an order outlawing that system in intercoastal trade was supportable.* Whatever doubt may have beset the court in answering this question was not a doubt of the Bureau's authority to *approve* it, but of the Bureau's authority to *forbid* it. The Court subjected the Bureau to the burden of demonstrating the legality of its order *against* the contract system, and was persuaded by

the record made before the Bureau that such order was valid because supported by substantial evidence, even though "* * * upon a consideration of all the evidence a Court might reach a difference conclusion * * *" (300 U. S. at 304). The Court continued:

> Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic (citing cases)
>
> In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, *so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter.* This was clearly recognized in the report upon which the present order is based. It states that the danger of cutthroat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, the Secretary concluded that this was the real purpose of the contract rate.
>
> * * * * *

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> There was thus evidence before the Secretary which tended to show that the contract rate system, by reason of the conditions prevailing in the traffic, had established a practical monopoly of cargoes moving from the Gulf ports to ports on the Pacific coast, *from which competing carriers were excluded by the provisions of the Conference agreement, except on terms which were practically prohibitive, and that, since the adoption of the Intercoastal Shipping Act of 1933, stability of service, which appellants urge as justification for the system, could be secured without a contract rate.* As the Secretary has interpreted the evidence, the operation of the contract system, in the circumstances of *this* case, does not differ substantially from that of "deferred rebates" outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act, 39 Stat. 733, 46 U. S. C. § 812.
>
> Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretary that the discrimination was unreasonable.

Thus, *Swayne & Hoyt* merely held that the Commission's predecessor, upon competent evidence, could forbid the system's use. It not only failed to establish the illegality of the contract system in the intercoastal trade, but neither it nor any other case that we can discover has outlawed the system in foreign trade. The system was lawful at common law. *Lough* v. *Outerbridge,* 243

N. Y. 271; Cf. *United States* v. *Hamburgh-American Line,* 216 Fed. 971, reversed as moot, 239 U. S. 466, and so remains under the Shipping Act. *Isbrandtsen Co., Inc.* v. *U. S.,* 81 F. Supp. 544, app. dis. 336 U. S. 941. The District Court, in granting the preliminary injunction in the instant suit, said of the contention that exclusive patronage contracts are illegal (81 F. Supp. at 546):

> *Very considerable doubt upon such a holding is thrown by Swayne & Hoyt, Ltd.* v. *U. S.,* 1937, 300 U. S. 297, 306, 307, and note 3, 57 S. Ct. 478, 81 L. ed. 659, *and by the legislative history of the statute,* H. R. Doc. No. 805, 63rd Cong., 2nd Sess., 1914, 287, 292.

CONCLUSION

The Maritime Board properly found that—

> the use of the dual-rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, * * * and does not operate to the detriment of the commerce of the United States and is not in violation of the Shipping Act of 1916.

The District Court assumed that the Board adopted the finding of the Examiner that non-contract rates were fixed by means of an arbitrary differential. It then held that this differential, because it was arbitrary, was unreasonable and therefore unjustly discriminatory, and consequently, inconsistent with the Board's finding above quoted.

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The word "arbitrary" as used by the Examiner and the witness Andrews meant merely that there was a differential between the contract and non-contract rates which was not measured by a scientific yardstick. Such differential is essential to the dual-rate system. The word "arbitrary" in the transportation field merely signifies a differential between two rates for the same service, both of which may be reasonable and valid. *Baltimore & Ohio R.* v. *United States,* 298 U. S. 349; *United States* v. *Illinois Central Railway Co.,* 263 U. S. 515.

The Board's ultimate finding was based on the evidence before it and was that of a tribunal of experts having specialized knowledge in the field of ocean transportation, and the finding should not have been set aside by the District Court.

The Maritime Board had authority under Section 15 of the Shipping Act to approve the use of the exclusive patronage system by the defendant conferences and their members. *Swayne & Hoyt* v. *United States,* 300 U. S. 297; *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474. There is no doubt of the authority of the Board in the exercise of its administrative discretion to disapprove the system, and disapproval would be unnecessary if the system were unlawful *per se.* The Board's authority to approve the system has been administratively considered from time to time and the notice of Congress has been explicitly invited to the problem. (See note 15, *supra,* p. 70).

Rawleigh v. *Stoomvart*, 1 U. S. S. B. 285, was decided by the Board in 1933. Since that date Congress has been officially aware of the Board's position that the exclusive patronage system is not inherently unlawful. If Congress had not been satisfied with the Board's interpretation of the law, it would presumably have amended the statute by denying to the Board authority to approve the dual-rate system.[20]

The Board's prior decisions dealing with the exclusive patronage system and the decision here under review are in accordance with the law and the Board has authority to authorize the use of the dual-rate system where it finds it necessary and helpful in promoting the ocean commerce of the United States.

The decree of the District Court should be reversed and the complaint dismissed.

Respectfully submitted.

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[20] Since *Rawleigh* v. *Stoomvart* in 1933, section 16 of the shipping act was amended in 1936 (Public Law 685, 74th Cong.); section 23 was amended in 1939 (53 Stat. 1182); and section 40 was amended in 1948 (62 Stat. 212). None of the amendments mentioned the dual-rate system.

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APPENDIX A

SECTIONS 14 AND 15, SHIPPING ACT, 1916

SEC. 14 (46 U. S. C. 812). That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommoda-

tions when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SEC. 15 (46 U. S. C. 814). That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any

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way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision [sic] of the Act approved July second, eighteen hundred and ninety, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," and amend-

ments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

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APPENDIX B

RECOMMENDATIONS OF THE ALEXANDER COMMITTEE RELATING TO WATER CARRIERS ENGAGED IN THE FOREIGN TRADE [21]

The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and outbound voyages, under the terms of written agreements, conference arrangements, or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of nonconference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report. (For a full classification of these agreements, see pp. 281 to 295 of the report.) The report also presents the economic advantages and disadvantages of steamship agreements and conference arrangements as presented to the Committee by steamship line rep-

[21] From Report on Steamship Agreements and Affiliations, House Committee on Merchant Marine and Fisheries, 63d Cong., under H. Res. 587; vol. IV, pp. 415–421.

resentatives and the exporting and importing interests of the United States. (For a full classification of the advantages and disadvantages, see pp. 295 to 307 of the foregoing report.)

In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses. It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. (A classification of the advantages claimed as resulting from the afore-mentioned factors is presented on pp. 295 to 303 of the foregoing report.)

These advantages, the Committee believes, can be secured only by permitting the several lines in

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any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.

Steamship line representatives, as well as the patrons of the lines, were almost a unit in em-

phasizing to the Committee the importance and necessity of the afore-mentioned advantages of agreements and conferences, and in asserting that these advantages can only be effected by permitting the several lines in a given trade to cooperate in the regulation of their rates and the expeditious handling of their business. Very few of the many exporters and importers who communicated with the Committee were opposed to agreements and conferences in themselves, provided they are fairly and honestly conducted. Many, however, objected to the secrecy with which agreements and conferences are now conducted; and stated that, while the advantages must be admitted, they have no assurance and no means of knowing whether the conditions claimed for agreements and conferences are always fulfilled. A considerable number of complaints were also filed with the Committee objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines. Unfortunately the truth of many of these complaints could not be ascertained because of the confidential nature of the information furnished. As pointed out in the report (p. 306), it seemed to be the general impression among shippers who

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filed complaints with the Committee that the conference lines——

> so completely dominate the shippers with whom they deal that these shippers cannot afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances.

While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service.

All monopolies——

As pointed out in the foregoing report (p. 304)——

> are liable to abuse, and in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control. While carriers by land are supervised and must conform to statutory requirements in the matter of rates and treatment of shippers, steamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory

> control without the shippers having any redress or protection. The lines are under no legal obligation to continue these advantages. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control.

The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective Government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of.

The consensus of opinion (see pp. 307 to 308 of the Report)—

As expressed in the testimony of witnesses and in the numerous communications received by the Committee from shippers——

> is overwhelmingly in favor of some form of government regulation of steamship carriers engaged in this country's foreign trade. Nearly all the steamship line representatives, who appeared before the Committee expressed themselves as not opposed to government supervision which is reasonable and which is limited to the requirements of full publicity and approval of all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies. On the other hand, the shippers who appeared as witnesses, or otherwise submitted recommendations for proposed legislation, were in the great majority of instances

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favorable to a comprehensive system of government supervision, sufficiently broad to embrace the regulation of rates without actually fixing them, the approval of contracts, agreements, and arrangements, and the general supervision of all conditions of water transportation which vitally affect the interests of shippers. While few of the shippers who communicated with the Committee by letter (and the same may be said of witnesses) attempted to specify the details of their recommendations, they are almost a unit in stating that they are convinced of the desirability of having the Interstate Commerce Commission, or a similar commission, exercise a general supervisory power over foreign water carriers and enforce among the conference lines at all times the various contentions which they have claimed for themselves during the hearings before the Committee. It is noteworthy that only five of the many communications received by the Committee, which were unfavorable to steamship agreements and conferences as now conducted, display an attitude of hostility toward government regulation. In fact, many of the communications received from shippers make it clear that the writers regard the contentions of the conference line representatives as advantageous to shipper and shipowner if they are honestly and fairly carried out, but state that their experience has been to the effect that, once the combination of lines is established, it is apt to be used in an arbitrary and unfair way by favoring some large corporation or friend to the detriment of other shippers. Such discriminations and arbitrary treatment, it is believed, can only be eliminated by the establishment of some legally constituted

authority which is empowered to hear complaints and to order the discontinuance of abuses.

Relative to such supervisory control by the government of steamship carriers in the foreign trade of the United States, the Committee offers the following recommendations:

(1) That navigation companies, firms or lines engaged in the foreign trade of the United States be brought under the supervision of the Interstate Commerce Commission as regards the regulation of rates, the approval of contracts entered into with other water carriers, with shippers, or with American railroads and other transportation agencies, and such other conditions of water transportation as affect the interests of shippers. The Committee has had under consideration the recommendation of a separate Commission for this purpose, but believes that, in view of the close relations existing between rail and water transportation, it would be best to entrust the supervisory control to the Interstate Commerce Commission. If found necessary, in view of the added duties involved in the extension of the Interstate Commerce Commission's jurisdiction to water transportation in accordance with the recommendations to follow, the Committee further recommends that the membership of the Commission be enlarged.

(2) That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agreements (or a

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complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies. All modifications and cancellations of such agreements or understandings as may be made from time to time should also be promptly filed. The Commission should be empowered to order canceled any such agreements, or any parts thereof, that it may find to be discriminating or unfair in character, or detrimental to the commercial interests of the United States.

(3) That the Interstate Commerce Commission be empowered to investigate fully complaints charging the unreasonableness or unfairness of rates, or to institute proceedings on its own initiative, and to order such rates changed if convinced that the rate under consideration is unreasonably high, or discriminating in character as between shippers, or ports, or between exporters of the United States and their foreign competitors; and to order restitution to shippers of all sums collected in excess of reasonable rates. This recommendation is also intended to extend to the supervision of freight classifications used by the lines, and the investigation of complaints charging refusal on the part of any carrier to properly adjust the rates between classes of commodities.

The committee realizes that the steamship business differs essentially from that of the railroads (for those differences see pp. 309 to 311 of the Report), and that it might prove injurious to

both ship owners and American exporters to require the lines to file their rates and not be permitted to lower the same until after a stipulated period of notice to change rates had been given. On the other hand, the committee feels that in the absence of government control steamship combinations may in many instances have it within their power to arbitrarily raise rates to an unreasonable degree both as regards the general level and in the case of particular commodities; or, if they so desire, to fail in maintaining rates from the United States to foreign markets on a parity with those from other countries. It is not the purpose of this recommendation to prevent steamship lines from promptly lowering their rates to meet competitive conditions and thus to favor American exporters, who, in competing with foreign markets, often find it necessary in order to close their contract to have quoted an immediate and favorable rate; but the purpose of the law should be to protect the shipper against any unreasonably high rate which the combination lines may have within their power, by virtue of their agreements and conference arrangements, arbitrarily to impose in the absence of government supervision and control.

(4) That rebating of freight rates to shippers be made illegal; and that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers, or ports, in the matter of rates and space accommodations be prohibited. In this connection it is the belief of the committee that water carriers should be required to charge equal rates to all shippers,

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irrespective of the volume of freight offered for shipment.

(5) That the Interstate Commerce Commission be empowered to investigate fully all complaints (or to undertake such investigation on its own initiative) charging (1) failure on the part of any carrier to give reasonable notice of increase in rates, (2) unfair treatment of shippers in the matter of cargo space and other facilities, (3) the existence of discriminating or unfair contracts with certain shippers, and (4) unfairness in the settlement of claims and indifference to the landing of freight in proper condition. In this connection the Commission should be empowered to order the discontinuance of all unfair or discriminating practices which it may find to exist, and to adopt whatever measures it may deem necessary to protect the complainant against retaliation.

(6) That the use of "fighting ships" and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason.

(7) That adequate penalties be provided to correct and prevent the abuses hereinabove set forth.

U. S. GOVERNMENT PRINTING OFFICE: 1932